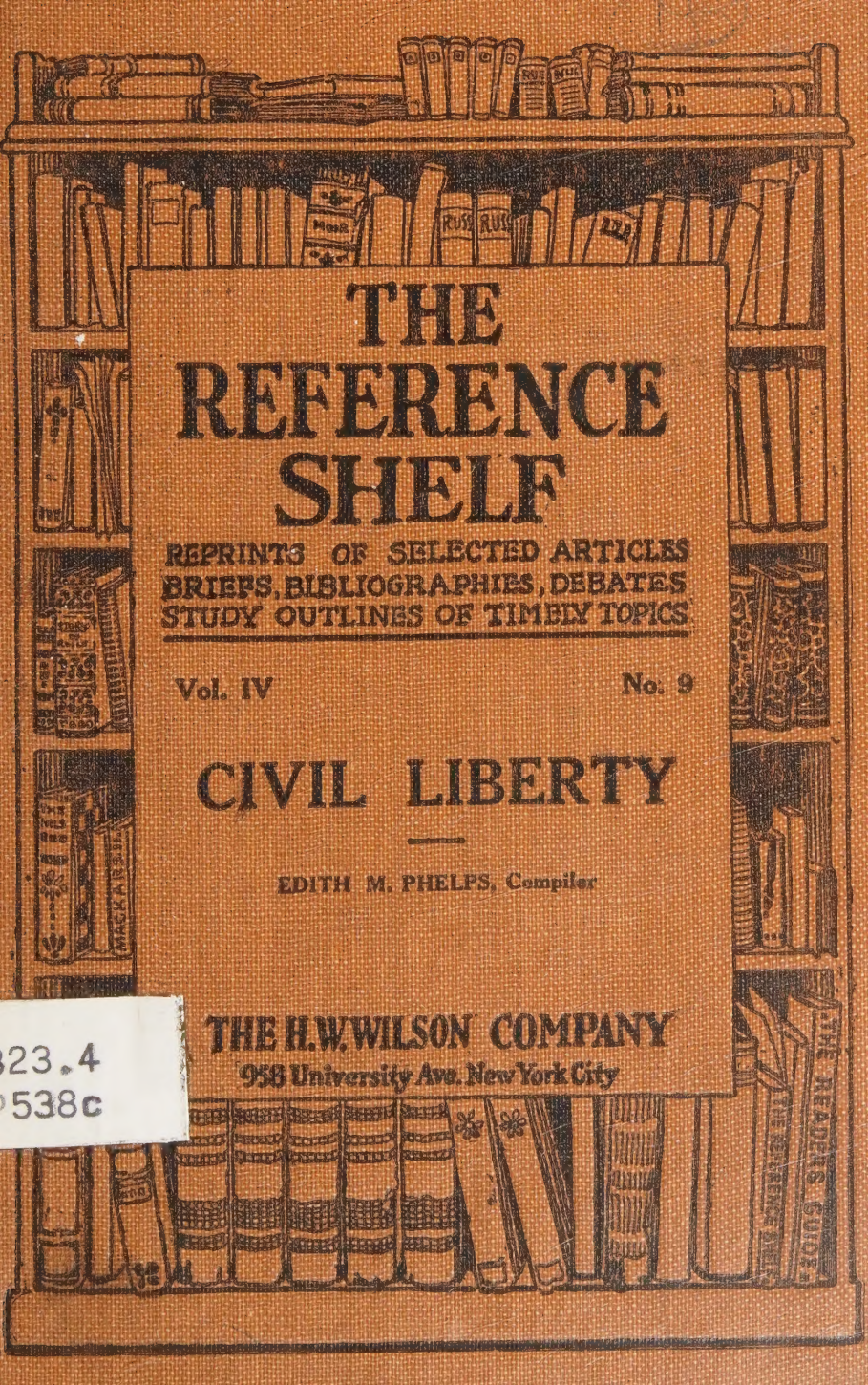

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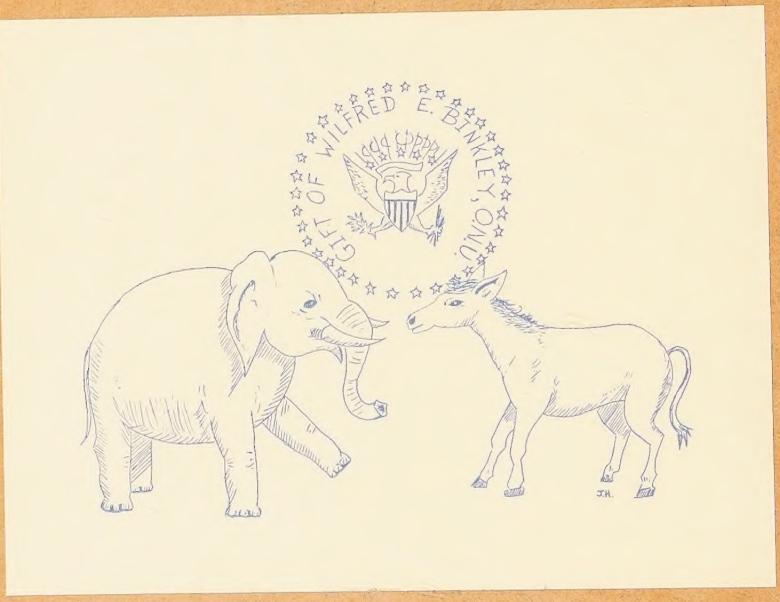
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EXPLANATORY NOTE

This volume contains the essential material on the freedom of expression of opinion from the viewpoint of the arguments for and against restrictions upon it. The factual material has been omitted as too voluminous for satisfactory selections but it has been covered in the rather extensive bibliography which is a feature of the volume. The material reprinted has been classified as follows:

Historical and Philosophical.
The Law.
- A. The Constitutional Guarantees.
- B. Laws Restricting Freedom of Opinion.

The Attitude of the Courts.
- A. Decisions.
- B. Injunctions.

Communist and Fascist Views.

Briefs have also been included, and an introduction has been contributed by Professor Zechariah Chafee, jr., Professor of Law of Harvard University.

Acknowledgment is hereby made to those who have contributed in securing the material for this volume, especially to the Staff of the American Civil Liberties Union, to Mr. Ralph M. Easley of the National Civic Federation, and also to Mr. Walter Nelles, Counsel for the American Civil Liberties Union, and Mr. Murray T. Quigg, Editor of *Law and Labor,* for the original articles contributed to the section on Injunctions.

EDITH M. PHELPS

February 10, 1927

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BRIEF

RESOLVED: *That no penalties should be imposed by law upon expressions of opinion or advocacies of any political, economic, religious, scientific or social doctrine or program in the absence of any criminal act either actually committed or attempted.*[1]

INTRODUCTION

I. Restrictions on freedom of expression of opinion have been imposed by laws sustained by the United States Supreme Court, passed chiefly since 1917, reversing the legal principle of over a century and putting an entirely new interpretation on the constitutional free speech guarantee.

   A. During the war restrictions were sustained as emergency measures, upon the theory that under the conditions of war various expressions created present danger of concrete evils which Congress had a right to prevent.

   B. The restrictions since the war under sedition and criminal syndicalism acts have been sustained on the theory that the state may protect itself from threats of its overthrow by violence or illegal action, whether or not there is immediate danger of overt acts following the utterance.

   C. The courts hold that language in itself may be penalized for its remote tendency to incite to

[1] NOTE: It should be understood that this general principle does not cover personal libels, obscenity (except where that charge is used to cover advocacies of doctrines) nor specific incitements to commit a specific crime made directly to one or more persons. The person who directly incites to an act which is actually committed or attempted is of course equally responsible with the person who commits it.

illegal acts, and that therefore freedom of speech and press may properly be limited by law.

D. In accordance with this position, other laws restricting expression of opinion have been passed, notably those prohibiting the teaching of evolution, and in one state, penalizing the advocacy of social equality between whites and blacks.

AFFIRMATIVE

I. The law should interfere only with acts or attempted acts because it is impracticable to judge offences by utterances in the absence of acts.

A. Restrictive statutes usually purport to forbid only advocacies of unlawful means for bringing about social change.

1. Such laws cannot be fairly enforced.

a. Clear cases of the kinds of advocacy they forbid rarely arise in practice.

b. Just what is advocated is debatable.

(1) So usually is its lawfulness.

c. Courts and juries, being human, can hardly avoid being controlled by personal prejudices in the construction of the law and of the language of the advocacy.

B. A main difficulty in the fair construction of such an advocacy of unlawful means arises from the fact that the advocate is concerned mainly with an *end*.

1. He wants to make people believe in the kind of society or government that he believes in.

a. He is only incidentally concerned with the *means* to that end.

2. But if the end in which he believes, how-

ever lawful, is opposed by prevailing sentiment, courts and juries will jump to the conclusion that it can be attained only by unlawful means, and so presume such means to be advocated.

C. Courts inevitably apply such laws to suit the prejudices of the majority, or the economic interests of the dominant group politically, as against expressions of unpopular heretical or revolutionary views, whether or not they include advocacy of anything unlawful.
   1. The evidence of history sustains this contention.
   2. The recent decisions of the United States Supreme Court illustrate it clearly, particularly when considered in the light of dissenting opinions by Justices Holmes and Brandeis.
   3. Prosecutions are always directed against members of a class opposed to the dominant group, and not against members of the dominant group who may advocate precisely the same illegal doctrines.
      a. Advocacies of violence by conservatives, and the Ku Klux Klan go unpunished, while the political theories of radicals are construed as advocacies of violence, and are punished.
      b. The same is true in other countries in the conflict between Fascists and Communists.
   4. Prosecution depends primarily not on the ideas expressed, but on the persons who express them and under what circumstances.
      a. They are therefore a cloak to cover an attack on persons opposed to an

interest influential enough to secure prosecution.

(1) The history of prosecution of radicals and others bears this out, particularly in industrial conflicts.

(2) An examination of radical, even revolutionary, utterances in other circumstances or by persons with secure standing (see the utterances in the "New Freedom" by Woodrow Wilson) bears it out.

II. Repression by law does not stop the spread of the penalized doctrines when they represent the needs of any considerable class or section.

A. It tends to drive them into secret and conspiratorial channels and encourages the resort to violence.

B. Where repression does succeed in stopping the spread of ideas, it produces a deadly conformity and stagnation of thought which blocks progress.

III. The principle of free speech, fixed in both federal and state constitutions, is based upon practical experience of political and economic life, and is sound policy in promoting social progress.

A. Without the exercise of freedom of expression by the colonial patriots—contrary to the laws then existing—American institutions could not have been established.

B. Without its continued exercise, American institutions cannot be kept in accord with the changing needs and adapted to the maximum welfare of the people.

1. Every reform which society has secured, has had to overcome the majority's hostility.
2. Even wild advocacies of change are usually evidence that real grievances exist which need constructive remedies.

C. Progress comes from minority views, which are needed by society as a whole in order to promote its growth.
   1. Society cannot stand still.
      a. Attempts by suppression to make it do so only result in the evils of violence and disorder.

D. If society is to progress to larger freedom, the more freedom accorded now in the struggles of conflicting groups, the more certain and the easier is that progress.
   1. Otherwise persecution of classes struggling to power will create the spirit of persecution in them which they will perpetuate when they achieve power.

E. Disinterested support of freedom of agitation helps win orderly advance for groups seeking power, and reduces the violence of the controlling class.

IV. Penalties on opinion kill thought and promote more evils than they prevent.

A. Even where they successfully silence opposition, they create a deadly peace in which society stagnates.
   1. The silenced opinion may be true and needed by society.
   2. In any event it has a portion of the truth.
   3. Only a collision of conflicting opinions gives the whole truth.

B. Even if the majority's views are conceded to be for the time being the whole truth on any subject, unless contested they will be held with little comprehension and will become mere formal professions (as in the case of many religious creeds.)

C. The minority view has a better claim to be heard than the majority, for it represents a neglected side of human problems.

D. If thought is not free for the most detested doctrines (atheism and free love for example) it is not free in any real sense.

E. If any idea is penalized, the tendency will be to extend repression, until majority prejudices are everywhere in control.

V. Even in the absence of penalties on opinion, social intolerance may produce an equally deadly repression. (Note the Ku Klux Klan control in large sections, and the effect of the southern attitude on the Negro problem.)

NEGATIVE

I. Society must protect itself from subversive ideas and movements, and cannot afford to wait until they have broken out into actual acts against the state or any property or other interest protected by the state.

A. Incitements tending to the commission of acts should be punished, and can be judged fairly even in the absence of acts or attempts.

1. Experience proves that incitements inspire acts, and governments are therefore justified in proceeding before the acts are actually committed.

a. The agitation of our colonial patriots

went practically unpunished, though violative of the British law of seditious libel and constructive treason.

b. The result was violent revolution, clearly unlawful, even though righteous.

B. The place to draw the line for prosecution is at specific incitements, as laid down by the United States Supreme Court in the Espionage Act cases, declaring the rule of a "clear and present danger" of an overt act as the guide to public policy.

C. General agreement on the necessity for government, private capital, and public morals (as represented in the restrictions on advocacy of birth control, etc.) demands that basic social institutions should be protected from attacks that threaten to undermine and destroy them.

D. If the doctrines persecuted are useful to society, and the majority is in error, they will survive persecution.

1. Prosecution may therefore be a fair test of their utility.

2. If the doctrines represent a class struggling for power by illegal means, it is right for the dominant political power to protect its own interests against them.

a. The right of revolution is offset by the right of any government to defend itself, both by arms and by prosecution of advocates of revolution.

E. Whatever the evils of suppression may be, they are not so great as the evils of unchecked incitement to revolutionary changes.

1. Whatever injustice may be done in penalizing opinion, it is more than offset by protecting the public peace and safety.

II. If the law does not penalize doctrines aimed at subverting society, private violence will accomplish the protection of the majority's interests.
   A. Maintenance of law is far preferable to private violence.
      1. History shows that where governments do not prevent violent conflicts between classes, anarchy and chaos prevail, and the strongest armed class rules, either by taking over the government (as in Italy and elsewhere) or by making its force impotent (as in China and elsewhere).
      2. A strong government maintaining law and order is far preferable to armed conflict between classes, and this law and order can be maintained only by armed public force and prosecutions of subversive elements, even for advocacies of revolutionary changes.

III. Freedom of opinion is only an ideal, expressed chiefly in the desires of suppressed classes, and cannot be realized completely in any society made up of conflicting classes, as are all societies today.
   A. The dominant class is therefore justified in suppressing its opponents.
      1. No real freedom of opinion exists in the midst of acute conflict.
         a. Both sides will use any means to maintain their power and position.
         b. Governments will invariably back the established economic class as against its opponents, and will use its armed force or its power of prosecution in behalf of it.
      2. The agitation for rights of full expression by the classes struggling for power is use-

ful only to diminish the force used against them, and to align with it those elements outside the struggle who prefer orderly progress, even of a revolutionary character, to violence.

3. Such agitation does not commit the class resorting to it to the principle of freedom of opinion, and it may discard it upon achieving power until its ends have been served. (Note the Communist attitude in Russia and throughout the world).
4. Real freedom of opinion is possible only when class conflict has been abolished by revolutionary changes in the economic and political system, and the necessity for a strong centralized government based on force has disappeared.
5. The present libertarian attitude toward freedom of opinion is a product of past class struggles (as was the attitude of the forefathers who put the Bill of Rights into the Constitution) and now represents
   a. An impotent and romantic idealism, or
   b. An unconscious preference for the present system of society as against any radical change.
      (1) Where that attitude is based on opposition to violence, it ignores the established violence of the existing order and is aimed primarily at the relatively little violence of the class striving for power.
6. As for the intolerances and repressions of opinion in other than the economic field, they represent either

a. An old class struggle (such as the religious conflicts of the middle ages), or

b. Merely a reflex of the central economic struggle of the present (such as racial and religious issues made more acute by intolerance aroused in the major industrial conflict).

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III. Struggle of Minorities for Freedom of Expression.
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Colyer et al. v. Skeffington. 265 Fed. 17. Judge George W. Anderson's decision.

Reversed Sub. nomine Skeffing vs. Katzeff (277 Fed. 129).

U.S. v. Cruikshank et al. (1875) 92 U.S. 542.

Involved the Federal enforcement law prohibiting conspiracies to interfere with rights guaranteed by the Federal Constitution (indictment was held insufficient in the present case).

[2] *See* decisions of Federal Courts.

Reynolds v. U.S. (1878) 98 U.S. 145.

Involved the question of religious freedom. The Poland Law, prohibiting polygamy, was held constitutional.

Fox v. Washington. (1915) 236 U.S. 273.

The Washington Law against publications inciting to lawlessness was held not unconstitutional as applied in this case.

Schenck v. U.S. (1919) 249 U.S. 47.

The Schenk case involved utterances punished by the Espionage act (40 Stat. 217).

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The Pierce case involved utterances punished by the Espionage act (40 Stat. 217).

Gilbert v. Minnesota. (1920) 254 U.S. 325.

The Minnesota sedition law was held constitutional as applying to times both of war and peace.

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The New York "criminal anarchy" law was held constitutional, punishing utterances aimed at revolutionary change.

See also section V-B, Contempt of Court.

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B. (1) *Injunctions in Labor Disputes;* (2) *Contempt of Court*

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Labor Injunctions

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Vegelahn v. Guntner. (1896) 167 Mass.92.

Enjoined picketing in support of a demand for higher wages although only two pickets patrolled the premises.

Hitchman Coal & Coke Co. v. Mitchell. (1917) 245 U.S. 229.

Upheld an injunction prohibiting the unionizing of West Virginia mines where "yellow dog" contracts were in existence.

Duplex Printing Press Co. v. Deering. (1921) 254 U.S. 443.

Held the Clayton law did not prohibit the issuance of injunction restraining a secondary boycott.

Gasaway v. Borderland Coal Corp. (1921) 278 Fed. 56. (Circuit Court of Appeals, Seventh Circuit).

Limited an injunction to prohibiting only the particular unlawful acts threatened.

Truax et al., Copartners, v. Corrigan. (1921) 257 U.S. 312.

Held the Arizona anti-injunction law to be unconstitutional.

U.S. v. Railway Employers Dept., A.F. of L. (1922-3. District Court, N.D. Illinois, E.D.). 283 Fed. 479; 286 Fed. 228; 290 Fed. 978.

Sustained the sweeping "Daugherty injunction" issued during the railway shop crafts strike.

Michaelson v. U.S. ex rel. C. St. P. M. & O. Ry. (1924) 266 U.S. 42.

Upheld the constitutionality of the provisions of the Clayton act for a jury trial in contempt cases.

Vulcan Detinning Co. v. St. Clair. (1924) 315 Ill. 40; 145 N.E. 657.

Limited the meaning of an injunction so as not to interfere with the constitutional guarantee of free speech.

Contempt of Court

Ex parte Poulson (1836) 19 Fed. Cas. No. 11. (350 Circuit Court, E.D. Pa.).

Limited the federal contempt statute (March 2, 1831) so as not to punish publication of a newspaper article reflecting on the defendant in a pending case.

Patterson v. Colorado. (1907) 205 U.S. 454.

The United States Supreme Court refused to review a Colorado contempt proceeding for a newspaper publication reflecting on the Colorado courts.

Gompers v. Bucks Stove and Range Co. (1911) 221 U.S. 418.

The American Federation of Labor "unfair list" was held to be an unlawful boycott which could be enjoined.

Marshall v. Gordon, Sergeant-at-Arms. (1917) 243 U.S. 521.

The House of Representatives could not punish the author of a newspaper article for contempt.

Toledo Newspaper Co. et al. v. U.S. (1918) 247 U.S. 402.

Newspaper criticism of a judge in connection with pending litigation may be punished as a contempt.

Craig v. Hecht, United States Marshall. (1923) 263 U.S. 255.

Where a newspaper publication attacks a judge in a pending matter, the Supreme Court will not review by habeas corpus the punishment for contempt where an appeal is made.

Cornish v. U.S. (1924) 299 Fed. 283. (Circuit Court of Appeals, Sixth Circuit).

To constitute a contempt of court a newspaper article must relate to a pending matter.

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What eighty-eight police chiefs replied to a questionnaire on radical meetings.

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INTRODUCTION

Governmental interference with "freedom of speech and of the press" is forbidden by the United States Constitution and in somewhat different language by the state constitutions. The framers said little to show what types of speech and publications they did or did not intend to protect by these clauses. They wisely refrained from crystallizing for all time an interpretation of liberty of discussion which might have proved too narrow for the needs of later centuries. Instead, they asserted the importance of that liberty as emphatically as they could, and left it for each succeeding generation to work out their own definition of its limits. The attitude of the men and women of a given time in our history toward this task is a significant test of their intelligence and vision. Are they content to repeat the language of the Bill of Rights as revered words with no concrete meaning or do they set themselves diligently to ascertain the proper extent of freedom of speech? Does their actual practice give to this great constitutional principle real power in the life of the nation?

We all desire that the next decade, judged by this test, shall stand high. The very reasons which underlie freedom of speech and make it essential that all important public questions shall be thoroughly overhauled in open controversy apply to this question of the limits of such freedom. Liberty of discussion must itself be constantly discussed. Therefore, the submission by the present volume of aspects of the problem for debate in schools and colleges is highly desirable.

The importance of the issue here presented is plain when we recall the great changes in political, economic,

and social institutions which have taken place in recent years. Equally great changes are certain to be proposed in the near future, and thorough going discussion is necessary if they are to be wisely rejected or wisely carried out. Even the most cherished institutions cannot hope to be immune from attack, but they may seek to protect themselves by developing sensitive spots in popular consciousness which are to be shielded from the rough contacts of controversy by censorship and criminal prosecutions. It will be urged, often with logical strength, that these institutions cannot be adequately preserved from insidious or violent overthrow if they are merely left to meet the arguments of their opponents with better arguments. The government must interfere in the initial stages of talk and print, or it will be too late. In former centuries such sensitive spots were common in religious thought, from which the Tennessee anti-evolution statute shows they have not wholly disappeared, but in the near future the problem, of how far the government and the community should tolerate utterances which they consider dangerous, is most likely to arise in connection with monogamous marriage, the status of the white race, the existing organization and distribution of private property, the maintenance of the army and navy especially in war, and the continuance of our political system.

This book provides abundant material on both sides of the problem. The advantages of unrestricted discussion are perhaps best stated in the extracts from Milton and Mill, and its dangers by the recent majority opinions of the United States Supreme Court. On the latter side readers who are tempted to pursue their inquires beyond the present volume will find a powerful reply to Mill in Fitzjames Stephen's *Liberty, Equality, and Fraternity*, which in turn meets a rejoinder on Mill's behalf in the biography of Stephen by his brother Leslie Stephen.

That much of the material here published is legal in nature should not mislead the reader into supposing that

he is dealing merely with a legal problem. Suppression of opinion may be exerted through many other channels than the police and the courts. Nearly every one is sooner or later given the opportunity to choose between tolerating and restricting opinions which to him seem absurd, grossly distasteful, and dangerous, whether as a parent guiding the conversation and reading of his children, as a teacher suggesting lines of thought for the classroom, as a publisher or editor of a newspaper or magazine presented with a book or article, as a bookseller or librarian deciding whether to exclude a publication from his shelves, as an employer tempted to discharge a workman who expresses radical views to his fellows, as a trade unionist voting on the expulsion of a Communist, as as a member of a community inclined to deal with a heterodox individual by the pressure of social ostracism or even stiffer measures.

Even in the field of the law, the amount of liberty of expression at a given time depends on the police as much as on the judges. Even if one of the most liberal definitions of freedom of speech suggested in these pages be adopted by the judge who sits at the trial of an agitator or a pacifist, the actual choice between conviction and acquittal is made by the twelve jurymen drawn from the community and applying its views of toleration. If they are unconvinced of the value of open discussion and determined to suppress the distasteful doctrines, only in rare cases can this verdict of guilty be set aside by appellate judges however liberal. Furthermore, the original decision about arresting and prosecuting the heterodox person—often enough to silence his views until the crisis is over even if he be ultimately acquitted—may be made by the district attorney in response to the energetically voiced demand of an intolerant community. And the judges themselves as citizens living in close contact with their fellow citizens cannot remain wholly immune from the intellectual and emotional atmosphere. It thus be-

comes a matter of prime importance in the actual administration of the constitutional guarantee whether free speech and a free press are really desired or not by the man in the street.

In conclusion, two points may be emphasized. First, we must distinguish between constitutional, legal, and ethical considerations. The decision that a law limiting speech is constitutional does not mean it ought to be passed. It may still be highly undesirable for the government to use its constitutional power. In considering such a statute our citizens should apply just the same tests of public danger as against the great advantages of unrestricted discussion set forth by Milton and Mill which would be applied in England where no written constitution exists. And on the other hand, the fact that it is legal to speak or write intemperately in critical moments does not mean that an individual should always do so without hesitation. It is for him to consider seriously whether the gain of speaking out as he proposes is sufficient to justify him in outraging the feelings of his neighbors or creating risks of violence. Much that is constitutional is undesirable, and much that is legal is undesirable.

Secondly, the argument of Milton and Mill that unrestricted discussion is the best way to ascertain and disseminate truth loses much of its force if the discussion, even though unhampered by law, will not be thorough. It may be necessary for the community not to rest content with a negative attitude of hands off but to adopt in addition positive measures to ensure that argument and counter argument on vital issues will have full play. Thus if a group of discontented workingmen have never learned English, the radical agitator who knows their language has it all his own way unless the conservatives send speakers of their own who can be understood. And if one party to a controversy hires all the halls and controls all the newspapers and broadcasting stations, the

other side is silenced almost as much as if its members were prosecuted. The problem of free speech is not adequately considered unless some attention be paid to the opportunity which all sides have to express themselves in open forums, street meetings, a fair minded or varied press, and radio stations open to all-comers who will pay a reasonable price. The next few years may see increasing attention paid to measures, taken by government or private enterprise, to ensure that all views have access through these channels to the public. The free speech controversy has thus extended to a new ground, which the debaters who use this volume should not neglect.

ZECHARIAH CHAFEE, JR.

January 7, 1927.

HISTORICAL AND PHILOSOPHICAL

Affirmative

AMERICAN SOURCES

Thomas Jefferson [1]

If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

Abraham Lincoln [2]

The country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it. . . If by the mere force of numbers a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would if such a right were a vital one. . . A majority held in restraint by constitutional checks and limitations, always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. . . At the same time, the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made,

[1] From the Inaugural address of 1801. In *Harper's Encyclopedia of United States History.* B. J. Lossing, editor. Vol V. p. 134. Harper. New York. 1912.

[2] Excerpt from the First Inaugural address, March 4, 1861.

in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal.

William Ellery Channing (1780-1842) [8]

Freedom of opinion, of speech, and of the press is our most valuable privilege, the very soul of republican institutions, the safeguard of all other rights. . . Nothing awakens and improves men so much as free communications of thoughts and feelings.

If men abandon the right of free discussion; if, awed by threats, they suppress their convictions; if rulers succeed in silencing every voice but that which approves them; if nothing reaches the people but what would lend support to men in power,—farewell to liberty. The form of a free government may remain, but the life, the soul, the substance is fled.

We have lived to hear the strange doctrine, that to expose the measures of rulers is treason; and we have lived to see this doctrine carried into practice. The cry has been that war is declared, and all opposition should therefore be hushed. A sentiment more unworthy of a free country could hardly be propagated. If the doctrine be admitted rulers have only to declare war and they are screened at once from scrutiny. . . Our peace and all our interests require that a different sentiment should prevail. We should teach our present and all our future rulers that there is no measure for which they must render so solemn an account to their constituents as for a declaration of war; that no measure will be so freely, so fully discussed; and that no administration can succeed in persuading this people to exhaust their treasure and their blood in supporting war, unless it be palpably nec-

[8] American preacher and author, whose grandfather, William Ellery, was a signer of the Declaration of Independence.

essary and just. In war, then, as in peace, assert the freedom of speech and of the press. Cling to this as the bulwark of all your rights and privileges.—*From "The Present Age"; address delivered before the Mercantile Library Company of Philadelphia, May* 11, 1841. *In Works of William Ellery Channing. 11th ed. Vol.* 6. *p.* 149. *Geo. C. Channing. Boston.* 1849.

The defenders of freedom are not those who claim and exercise rights which no one assails, or who win shouts of applause by well turned compliments to liberty in the days of her triumph. They are those who stand up for rights which mobs, conspiracies, or single tyrants put in jeopardy; who contend for liberty in that particular form which is threatened at the moment by the many or the few.

The greatest truths are often the most unpopular and exasperating; and were they to be denied discussion till the many should be ready to accept them, they would never establish themselves in the general mind. The progress of society depends on nothing more than on the exposure of time-sanctioned abuses, which cannot be touched without offending multitudes, than on the promulgation of principles which are in advance of public sentiment and practice, and which are consequently at war with the habits, prejudices, and immediate interests of large classes of the community. The right of free discussion is therefore to be guarded by the friends of mankind with peculiar jealousy. It is at once the most sacred and most endangered of all our rights. He who would rob his neighbor of it should have a mark set on him as the worst enemy of freedom.—*From "The Abolitionists"; a letter to James G. Birney, editor of the "Philanthropist": an anti-slavery paper in Cincinnati. In Works of William Ellery Channing. 11th ed. Vol.* 2, *p.* 159-60, 161. *Geo. C. Channing. Boston.* 1849.

Theodore Parker (1810-1860) [4]

Your President tells us it is treason to talk so! Treason is it? Treason to discuss a war which the government made and which the people are made to pay for? Why, if the people cannot discuss the war they have got to fight and to pay for, who under heaven can? Whose business is it, if it is not yours and mine?

I think lightly of what is called treason against a government. That may be your duty today, or mine. But treason against the people, against mankind, against God, is a great sin, not lightly to be spoken of.

Wendell Phillips (1811-1884) [5]

No matter whose the lips that would speak, they must be free and ungagged. Let us believe that the whole of truth can never do harm to the whole of virtue; and remember that in order to get the whole of truth you must allow every man, right or wrong, freely to utter his conscience, and protect him in so doing. Entire unshackled freedom for every man's life, no matter what his doctrine—the safety of free discussion no matter how wide its range. The community which dares not protect its humblest and most hated member in the free utterance of his opinions, no matter how false or hateful, is only a gang of slaves.

If there is anything in the universe that can't stand discussion, let it crack.

Henry David Thoreau (1817-1862) [6]

Must the citizen even for a moment, or in the least degree, resign his conscience to the legislator? Why has

[4] American preacher and social reformer, whose grandfather, Captain John Parker, was the leader of the Lexington Minute Men. Excerpt from "A Sermon on the Mexican War," preached at the Melodeon, June 25, 1848. Coolidge and Wiley. Boston. 1848.

[5] American orator, social reformer, and ardent Abolitionist.

[6] American naturalist and writer.

every man a conscience, then? I think that we should be men first, and subjects afterwards. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume is to do at any time what I think right. . .

There is no need of a law to check the license of the press. It is law enough and more than enough to itself. Virtually the community must have come together and agreed what things shall be uttered, have agreed on a platform and to excommunicate him who departs from it, and no one in a thousand dares utter anything else.

MARK TWAIN (SAMUEL LANGHORNE CLEMENS) [7]

The loud little handful, as usual, will shout for the war. The pulpit will—warily and cautiously—object at first; the great big, dull bulk of the Nation will rub its sleepy eyes and try to make out why there should be a war, and will say, earnestly and indignantly, "It is unjust and dishonorable, and there is no necessity for it." Then the handful will shout louder. A few fair men on the other side will argue and reason against the war with speech and pen, and at first will have a hearing and be applauded; but it will not last long; those others will outshout them, and presently the anti-war audiences will thin out and lose popularity. Before long you will see this curious thing: the speakers stoned from the platforms, and free speech strangled by hordes of furious men who in their secret hearts are still at one with those stoned speakers—as earlier—but do not dare to say so. And now the whole nation—pulpit and all—will take up the war-cry and shout itself hoarse, and mob any honest man who ventures to open his mouth; and presently such mouths will cease to open. Next the statesmen will invent cheap lies, putting the blame upon the nation that is attacked, and every man will be glad of their conscience

[7] From the "Mysterious Stranger." See *Mysterious Stranger and Other Stories*, by Mark Twain. Harper. New York. 1922.

soothing falsities, and will diligently study them, and refuse to examine any refutation of them; and thus he will bye and bye convince himself that the war is just, and will thank God for the better sleep he enjoys after this process of grotesque self-deception.—*"Satan" speaking of the affect of an aggressive war on liberty of opinion.*

FRANKLIN H. GIDDINGS[8]

Our government is based on the agreement both tacit and implied, that the minority shall always have the rights of free speech, of free press, and of free agitation, in order to convert itself if possible from a minority into a majority. As soon as these rights of the minority are denied, it will inevitably resort to secret meetings, conspiracies and finally force. In times of stress, it may be extremely embarrassing for the majority to be hampered in quick, decisive action by an obstinate minority; but nevertheless the recognition of the right of the minority is our sole bond of unity. For this reason, I repeat that any attempt to interfere with the rights of free speech and free press is a blow at the very foundations of our government.—*On the Espionage Bill,* 1917.

ZECHARIAH CHAFEE, JR.[9]

This book is an inquiry into the proper limitations upon freedom of speech, and is in no way an argument that any one should be allowed to say whatever he wants anywhere and at any time. We can all agree from the very start that there must be some point where the government may step in, and my main purpose is to make clear from many different angles just where I believe that point to lie. We ought also to agree that a man may believe that certain persons have a right to speak or other constitutional rights, without at all identifying himself

[8] Professor of Sociology, Columbia University.

[9] Professor of Law, Harvard University. From his *Freedom of Speech.* Copyright, 1920, by Harcourt, Brace & Howe, Inc. New York.

with the position and views of such persons. In a country where John Adams defended the British soldiers involved in the Boston Massacre and Alexander Hamilton represented British Loyalists and General Grant insisted upon amnesty for Robert E. Lee, it is surprising how in the last three years it has been impossible for any one to uphold the rights of a minority without subjecting himself to the accusation that he shared their opinions. If he urged milder treatment of conscientious objectors, he was a pacifist. If he held that the treaty with Germany should not violate the terms of the armistice, he was a pro-German. (p. 2)

The free speech clauses of the American constitutions are not merely expressions of political faith without binding legal force. Their history shows that they limit legislative action as much as any other part of the Bills of Rights. The United States Constitution as originally drafted contained no guaranty of religious or intellectual liberty, except that it forbade any religious test oath and gave immunity to members of Congress for anything said in debates. Pinckney, of South Carolina, had sought to insert a free speech clause, grouping liberty of the press with trial by jury and habeas corpus as "essentials in free governments". His suggestion was rejected by a slight majority as unnecessary, in that the power of Congress did not extend to the press, a natural belief before Hamilton and Marshall had developed the doctrine of incidental and implied powers. Hamilton himself defended the omission on the ground that liberty of the press was indefinable and depended only on public opinion and the general spirit of the people and government for its security, little thinking that he himself would frame a definition now embodied in the constitutions of half the states.

The citizens of the states were not satisfied, and the absence of the guaranty of freedom of speech was repeatedly condemned in the state conventions and in out-

side discussion. . . At the first session of Congress, a Bill of Rights including the present First Amendment, was proposed for adoption by the states, and became a part of the Constitution November 3, 1791. Massachusetts, Virginia, and Pennsylvania already had similar provisions, and such a clause was eventually inserted in the constitutions of all other states. Thus the guaranty of freedom of speech was almost a condition of the entry of four original states into the Union, and is now declared by every state to be as much a part of its fundamental law as trial by jury or compensation for property taken by eminent domain. Such a widely recognized right must mean something, and have behind it the obligation of the courts to refuse to enforce any legislation which violates freedom of speech.

We shall not, however, confine ourselves to the question whether a given form of federal or state action against pacifist and similar utterances is void under the constitutions. It is often assumed that so long as a statute is held valid under the Bill of Rights, that document ceases to be of any importance in the matter, and may be henceforth disregarded. On the contrary, a provision like the First Amendment to the federal Constitution,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

is much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. It is also an exhortation and a guide for the action of Congress inside that boundary. It is a declaration of national policy in favor of the public discussion of all public questions. Such a declaration should make Congress reluctant and careful in the enactment of all restrictions upon utterance, even though the courts will not refuse to enforce them as unconstitutional.

It should influence the judges in their construction of valid speech statutes, and the prosecuting attorneys who control their enforcement. The Bill of Rights in a European constitution is a declaration of policies and nothing more, for the courts cannot disregard the legislative will though it violates the Constitution. Our Bills of Rights perform a double function. They fix a certain point to halt the government abruptly with a "thus far and no farther"; but long before that point is reached they urge upon every official of the three branches of the state a constant regard for certain declared fundamental policies of American life. (p. 3-6)

If words do not become criminal until they have "an immediate tendency to produce a breach of the peace", there is no need for a law of sedition, since the ordinary standards of criminal solicitation and attempt apply. Under those standards the words must bring the speaker's unlawful intention reasonably near to success. Such a limited power to punish utterances rarely satisfies the zealous in times of excitement like a war. They realize that all condemnation of the war or of conscription may conceivably lead to active resistance or insubordination. Is it not better to kill the serpent in the egg? All writings that have even a remote tendency to hinder the war must be suppressed.

Such has always been the argument of the opponents of free speech. And the most powerful weapon in their hands, since the abolition of the censorship, is this doctrine of indirect causation, under which words can be punished for a supposed bad tendency long before there is any probability that they will break out into unlawful acts. Closely related to it is the doctrine of constructive intent, which regards the intent of the defendant to cause violence as immaterial so long as he intended to write the words, or else presumes that violent intent from the bad tendency of the words on the ground that a man is

presumed to intend the consequences of his acts. (p. 25-6)

In 1798 the impending war with France, the spread of revolutionary doctrines by foreigners in our midst, and the spectacle of the disastrous operation of those doctrines abroad,—facts that have a familiar sound today—led to the enactment of the Alien and Sedition Laws. The Alien Law allowed the President to compel the departure of aliens whom he judged dangerous to the peace and safety of the United States, or suspected, on reasonable grounds, of treasonable or secret machinations against our government. The Sedition Law punished false, scandalous, and malicious writings against the government, either House of Congress, or the President, if published with intent to defame any of them or to excite against them the hatred of the people, or to stir up sedition or to excite resistance of law, or to aid any hostile designs of any foreign nation against the United States. The maximum penalty was a fine of two thousand dollars and two years' imprisonment. Truth was a defense, and the jury had power to determine criminality as under Fox's Libel Act. Despite the inclusion of the two legal rules for which reformers had contended, and the requirement of an actual intention to cause overt injury, the Sedition Act was bitterly resented as invading the liberty of the press. Its constitutionality was assailed on that ground by Jefferson, who pardoned all prisoners when he became President, Congress eventually repaid all the fines, and popular indignation at the Act and the prosecutions wrecked the Federalist party. In those prosecutions words were once more made punishable for their judicially supposed bad tendency, and the judges reduced the test of intent to a fiction by inferring the bad intent from this bad tendency.

Whether or not the Sedition Act was unconstitutional, and on that question Jefferson seems right, it surely

defeated the fundamental policy of the First Amendment, the open discussion of public affairs. Like the British trials, the American sedition cases showed, as Professor Schofield demonstrates, "the great danger . . . that men will be fined and imprisoned, under the guise of being punished for their bad motives, or bad intent and ends, simply because the powers that be do not agree with their opinions, and spokesmen of minorities may be terrorized and silenced when they are most needed by the community and most useful to it, and when they stand most in need of the protection of the law against a hostile, arrogant majority." (p. 29-30)

It is now clear that the First Amendment fixes limits upon the power of Congress to restrict speech either by a censorship or by a criminal statute, and if the Espionage Act exceeds those limits it is unconstitutional. It is sometimes argued that the Constitution gives Congress the power to declare war, raise armies, and support a navy, that one provision of the Constitution cannot be used to break down another provision and consequently freedom of speech cannot be invoked to break down the war power. I would reply that the First Amendment is just as much a part of the Constitution as the war clauses, and that it is equally accurate to say that the war clauses cannot be invoked to break down freedom of speech. The truth is that all provisions of the Constitution must be construed together so as to limit each other. In a war as in peace, this process of mutual adjustment must include the Bill of Rights. There are those who believe that the Bill of Rights can be set aside in war time at the uncontrolled will of the government. The first ten amendments were drafted by men who had just been through a war. The Third and Fifth Amendments expressly apply in war. A majority of the Supreme Court declared the war power of Congress to be restricted by the Bill of Rights in Ex Parte Milligan, which cannot be

lightly brushed aside, whether or not the majority went too far in thinking that the Fifth Amendment would have prevented Congress for exercising the war power under the particular circumstances of that case. If the First Amendment is to mean anything, it must restrict powers which are expressly granted by the Constitution to Congress, since Congress has no other powers. It must apply to those activities of government which are most liable to interfere with free discussion, namely, the postal service and the conduct of war.

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for as Bagehot points out, once force is thrown on the false side or the true, truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with those purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.

Or to put the matter another way, it is useless to define free speech by talk about rights. The agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock. Each side takes the position of the man who was arrested for swinging his arms and hitting another in the nose, and asked the judge if he did not have a right to swing his arms in a free country. "Your right to swing your arms ends just where the other man's nose begins." To find the boundary line of any right, we must get behind rules of law to human facts. In our problem, we must regard the desires and needs of the

individual human being who wants to speak and those of the great group of human beings among whom he speaks. That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right. It must never be forgotten that the balancing cannot be properly done unless all the interests involved are adequately ascertained, and the great evil of all this talk about rights is that it entirely overlooks the human desires and needs behind that claim.

The rights and powers of the Constitution, aside from the portions which create the machinery of the federal system, are largely means of protecting important individual and social interests, and because of this necessity of balancing such interests the clauses cannot be construed with absolute literalness. (p. 32-5)

The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperilled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.

Thus our problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts. We cannot define the right of free speech with the precision of the Rule

against Perpetuities or the Rule in Shelley's Case, because it involves national policies which are much more flexible than private property, but we can establish a workable principle of classification in this method of balancing and this broad test of certain danger. There is a similar balancing in the determination of what is "due process of law". We can insist upon various procedural safeguards which make it more probable that a tribunal will give the value of open discussion its proper weight in the balance. . . And we can with certitude declare that the First Amendment forbids the punishment of words merely for their injurious tendencies. The history of the Amendment and the political function of free speech corroborate each other and make this conclusion plain. (p. 38-9)

Long before the armistice it became clear that the problem of freedom of speech would not end with the war, but would be raised for us in a different aspect and with added difficulties by the unaccustomed prevalence and outspoken expression of radical ideas. Despite my own adherence to traditional political and economic views, I believe that this phenomenon was bound to result from the war. The routine of the day's work ordinarily holds in check the eternal antagonism of the "have-nots" to the "haves", but habits of mechanical obedience and adjustment to the prevailing scheme of life were suddenly destroyed for many by the rapid shift to new scenes and occupations and a novel conviction of the power of unskilled labor. The immense amount of thought and discussion caused by the war during the three years preceding our entry has been often remarked. Such an overhauling directed popular attention to the part played by economic factors in the origin and conduct of the war. Many extreme radicals claimed therefrom fresh proof of the economic interpretation of history and the class struggle. The official emphasis on democracy against autocracy inevitably stimulated discussion of those two

concepts and their application to industrial and other non-political fields. Labor programs in England and France crossed the ocean. Then came one of the earthquakes of history, from whose remote influence it was as impossible for us to escape as from the French Revolution which produced the Alien and Sedition Laws of 1798. . .

Much of this radicalism had identified itself with the opposition to the war, and thereby been involved in prosecutions under the Espionage Act and the state laws. (p. 161-2)

This union of hostility to the war with strange economic and political doctrines set its mark on the later war legislation. The amended Espionage Act of 1918 included the clauses about defamation of our form of government and curtailment of production which played such a prominent part in the Abrams case. A federal Sabotage Act was enacted. States punished the advocacy of syndicalism and sabotage in their war statutes or more often by separate acts. Much of this legislation extended automatically to peace-time utterances, and when it did not, it was easy and natural to adapt it for that purpose by the omission of a few military phrases. In the legislative sessions which followed the armistice, emergency laws against anarchy and criminal syndicalism were adopted by state after state with a coincidence of time and phraseology which proved either a uniform danger throughout the country or the operation of M. Tarde's Laws of Imitation. (p. 163)

The presence in our midst of new forces that make for disorder and violence renders it desirable to review the resources of our law for dealing with insurrection, bombs, and assassination, and to examine calmly recent and pending legislation to prevent the promotion of anarchy. The disruption of our social and economic fabric by revolution, or even the continual recurrence of local outrages, would be so disastrous that they ought to be

prevented in the wisest and most effective manner. Many persons take it for granted that any statute which is directed against those evils must be beneficial. That does not necessarily follow. If an emergency really exists, it behooves us all to keep cool, and consider with great care any new laws, and particularly the bills lately introduced in Congress, to see whether they are actually needed to combat the danger, whether they will really meet it, and whether in the haste and excitement of the moment our legislators may not be going much too far.

This country has been able without any anarchy acts to cope with several insurrections like Shay's Rebellion and the Dorr War, a considerable amount of anarchy, and a great many turbulent strikes. May it not be that a wise and vigorous enforcement of the ordinary criminal law will meet most, if not all, of the present danger?

I. The Normal Law Against Violence and Revolution

As far as state prosecutions are concerned, there has been very little need of specific legislation against anarchy and criminal syndicalism. Actual violence against government, life, and property is punishable everywhere. Those who plan or counsel such violence are liable even if they do not actively participate. When several policemen were killed by a bomb at the Haymarket in Chicago in 1886, spies and other anarchists were convicted and executed though it was clear that some one else threw the bomb. Nor is it necessary that any criminal act shall take place. An unsuccessful attempt at a serious crime or a definite solicitation of another to commit it is punishable under the general criminal law. Chief Justice Morton of Massachusetts said in 1883, while upholding the sentence of one Flagg for urging another without success to burn down a barn: "It is an indictable offense at common law to counsel and solicit another to commit a felony or other aggravated offense, although the solicitation is of no effect, and the crime counseled is not in fact committed."

Consequently, the normal law of the states and District of Columbia, apart from any legislation against anarchy, enables the police and the courts to deal vigorously with actual or threatened insurrection, explosions, or assassination. (p. 164-5)

Most of the legislation since 1917 has, however, been far more extensive. About one-third of the states have applied the New York statutory scheme to the new crime of criminal syndicalism, "the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods as a means of accomplishing or effecting industrial or political ends, or . . . industrial or political revolution, or for profit." The advocacy of any unlawful act for such ends is among the offenses punishable by imprisonment from one to ten years. These acts are almost uniform in phraseology, Idaho having apparently supplied the original model. Some states depart from type into much vaguer phraseology. Thus, Arizona in an act which Governor Hunt allowed to become law without being willing to put his name to it makes it criminal to advocate the violation of "the constitutional or statutory rights of another as a means of accomplishing industrial or political ends." Montana punishes in peace all the non-military crimes mentioned in the federal Espionage Act of 1918 as well as "any language calculated to incite or inflame resistance to any duly constituted state authority." West Virginia makes criminal any teachings in sympathy with or in favor of "ideals hostile to those now or henceforth existing under the constitution and laws of this state." (p. 190)

ERNST FREUND[10]

A proposition to forbid and punish the teaching or the propagation of the doctrine of anarchism, i.e., the doc-

[10] Professor of Jurisprudence and Public Law, University of Chicago. From his *Police Power: Public Policy and Constitutional Right.* Callaghan & Co. Chicago. 1904.

trine or belief that all established government is wrongful and pernicious and should be destroyed is inconsistent with the freedom of speech and press, unless carefully confined to cases of solicitation of crime, which will be discussed presently.

As the freedom of religion would have no meaning without the liberty of attacking all religion, so the freedom of political discussion is merely a phrase if it must stop short of questioning the fundamental ideas of politics, law and government. Otherwise every government is justified in drawing the line of free discussion at those principles or institutions, which it deems essential to its perpetuation—a view to which the Russian government would subscribe.

It is the essence of political liberty that it may create disaffection or other inconvenience to the existing government, otherwise there would be no merit in tolerating it. This toleration, however, like all toleration, is based not upon generosity, but on sound policy; on the consideration, namely, that ideas are not suppressed by suppressing their free and public discussion, and that such discussion alone can render them harmless and remove the excuse for illegality by giving hope of their realization by lawful means.

Freedom of speech finds, however, its limit in incitement to crime and violence. By the principles of the common law, the procurement of crime is in itself a criminal act, and a conspiracy to commit a crime is criminal though the end is never accomplished or even undertaken. The prohibition of acts punishable at common law is of course within the constitutional power of the state governments. Therefore a statute may validly forbid all speaking and writing, the object of which is to incite directly to the commission of violence and crime. (Secs. 475-6. p. 509-10)

In accordance with the principles above set forth the constitutional guaranty of freedom of speech and press

and assembly demands the right to oppose all government and to argue that the overthrow of government cannot be accomplished otherwise than by force; and the statutes referred to, in so far as they deny these rights, should consequently be considered as unconstitutional. (Sec. 478, p. 513)

ENGLISH SOURCES

John Stuart Mill (1806-1873) [1]

The appropriate region of human liberty comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.

Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

No society in which these liberties are not, on the

[1] English philosopher and economist. From his *On Liberty*. J. W. Parker & Son. London. 1859.

whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

Though this doctrine is anything but new, and, to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and practice. (Introd. p. 26)

Apart from the peculiar tenets of individual thinkers, there is also in the world at large an increasing inclination to stretch unduly the powers of society over the individual, both by the force of opinion and even by that of legislation: and as the tendency of all the changes taking place in the world is to strengthen society, and diminish the power of the individual, this encroachment is not one of the evils which tend spontaneously to disappear, but, on the contrary, to grow more and more formidable. The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power; and as the power is not declining, but growing, unless a strong barrier of moral conviction can be raised against the mischief, we must expect in the present circumstances of the world, to see it increase. (Introd. p. 29)

Speaking generally, it is not, in constitutional countries, to be apprehended, that the government, whether completely responsible to the people or not, will often attempt to control the expression of opinion, except when in doing so it makes itself the organ of the general intolerance of the public. Let us suppose, therefore, that the government is entirely at one with the people, and never thinks of exerting any power of coercion unless in agreement with what it conceives to be their voice. But I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate. The best government has no more title to it than the worst. It is as noxious, or more noxious, when exerted in accordance with public opinion, than when in opposition to it. If all mankind minus one were of one opinion, and only one person were of the contrary opinion mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right they are deprived of the opportunity of exchanging error for truth: if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth. (p. 31)

We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still. (p. 34)

The opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility. (p. 36)

The objection likely to be made to this argument, would probably take some such form as the following. There is no greater assumption of infallibility in forbidding the propagation of error than in any other thing which is done by public authority on its own judgment and responsibility. Judgment is given to men that they may use it. Because it may be used erroneously, are men to be told that they ought not to use it at all? To prohibit what they think pernicious, is not claiming exemption from error, but fulfilling the duty incumbent on them, although fallible, of acting on their conscientious conviction. If we were never to act on our opinions because those opinions may be wrong, we should leave all our interests uncared for and all our duties unperformed. An objection which applies to all conduct can be no valid objection to any conduct in particular.

It is the duty of governments, and of individuals, to form the truest opinions they can; to form them carefully and never impose them upon others unless they are quite sure of being right. But when they are sure (such reasoners may say), it is not conscientiousness but cowardice to shrink from acting on their opinions, and allow doctrines which they honestly think dangerous to the welfare of mankind, either in this life or in another, to be scattered abroad without restraint, because other people in less enlightened times have persecuted opinions now be-

lieved to be true. Let us take care, it may be said, not to make the same mistake: but governments and nations have made mistakes in other things, which are not denied to be fit subjects for the exercise of authority: they have laid on bad taxes, made unjust wars. Ought we therefore to lay on no taxes, and under whatever provocation, make no wars? Men and governments must act to the best of their ability. There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of human life. We may, and must, assume our opinion to be true for the guidance of our own conduct: and it is assuming no more when we forbid bad men to pervert society by the propagation of opinions which we regard as false and pernicious. (p. 36-7)

The beliefs which we have most warrant for, have no safeguard to rest on but a standing invitation to the whole world to prove them unfounded. If the challenge is not accepted, or is accepted and the attempt fails, we are far enough from certainty still; but we have done the best that the existing state of human reason admits of; we have neglected nothing that could give the truth a chance of reaching us: if the lists are kept open, we may hope that if there be a better truth it will be found when the human mind is capable of receiving it; and in the mean time we may rely on having attained such approach to truth, as is possible in our own day. This is the amount of certainty attainable by a fallible being, and this the sole way of attaining it.

Strange it is, that men should admit the validity of the arguments for free discussion but object to their being "pushed to an extreme"; not seeing that unless the reasons are good for an extreme case, they are not good for any case. Strange that they should imagine that they are not assuming infallibility, when they acknowledge that there should be free discussion on all subjects which can possibly be *doubtful,* but think that some particular prin-

ciple or doctrine should be forbidden to be questioned because it is *so certain*, that is, because *they are certain* that it is certain. To call any proposition certain while there is any one who would deny its certainty if permitted, but who is not permitted, is to assume that we ourselves, and those who agree with us, are the judges of certainty, and judges without hearing the other side. (p. 40-2)

There are, it is alleged, certain beliefs, so useful, not to say indispensable to well-being, that it is as much the duty of governments to uphold those beliefs, as to protect any other of the interests of society. In a case of such necessity, and so directly in the line of their duty, something less than infallibility may, it is maintained, warrant, and even bind, governments, to act on their own opinion, confirmed by the general opinion of mankind. It is also often argued, and still oftener thought, that none but bad men would desire to weaken these salutary beliefs; and there can be nothing wrong, it is thought, in restraining bad men, and prohibiting what only such men would wish to practise. This mode of thinking makes the justification of restraints on discussion not a question of the truth of doctrines, but of their usefulness; and flatters itself by that means to escape the responsibility of claiming to be an infallible judge of opinions. But those who thus satisfy themselves, do not perceive that the assumption of infallibility is merely shifted from one point to another. The usefulness of an opinion is itself matter of opinion: as disputable, as open to discussion, and requiring discussion as much, as the opinion itself. There is the same need of an infallible judge of opinions to decide an opinion to be noxious, as to decide it to be false, unless the opinion condemned has full opportunity of defending itself. And it will not do to say that the heretic may be allowed to maintain the utility or harm-

lessness of his opinion, though forbidden to maintain its truth. The truth of an opinion is part of its utility. (p. 42-3)

The dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution. If not suppressed forever, it may be thrown back for centuries. To speak only of religious opinions: the Reformation broke out at least twenty times before Luther, and was put down. Arnold of Brescia was put down. Fra Dolcino was put down. Savonarola was put down. The Albigeois were put down. The Vaudois were put down. The Lollards were put down. The Hussites were put down. Even after the era of Luther, wherever persecution was persisted in, it was successful. In Spain, Italy, Flanders, the Austrian empire, Protestantism was rooted out; and, most likely would have been so in England had Queen Mary lived, or Queen Elizabeth died. Persecution has always succeeded, save where the heretics were too strong a party to be effectually persecuted.

No reasonable person can doubt that Christianity might have been extirpated in the Roman empire. It spread and became predominant, because the persecutions were only occasional, lasting but a short time and separated by long intervals of almost undisturbed propagandism. It is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error, of prevailing against the dungeon and the stake. Men are not more zealous for truth than they often are for error, and a sufficient application of legal or even of social penalties will generally succeed in stopping the propagation of either. The real advantage which truth has consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of

ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favorable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it. (p. 52-4)

Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them, or to abstain from any active effort for their diffusion. With us, heretical opinions do not perceptibly gain, or even lose, ground in each decade or generation; they never blaze out far and wide, but continue to smoulder in the narrow circles of thinking and studious persons among whom they originate, without ever lighting up the general affairs of mankind with either a true or a deceptive light. And thus is kept up a state of things very satisfactory to some minds, because, without the unpleasant process of fining or imprisoning anybody, it maintains all prevailing opinions outwardly undisturbed, while it does not absolutely interdict the exercise of reason by dissentients afflicted with the malady of thought. A convenient plan for having peace in the intellectual world, and keeping all things going on therein very much as they do already. But the price paid for this sort of intellectual pacification is the sacrifice of the entire moral courage of the human mind. (p. 59-60)

But it is not the minds of heretics that are deteriorated most by the ban placed on all inquiry which does not end in the orthodox conclusions. The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reason cowed by the fear of heresy. Who can compute what the world loses in the multitude of promising intellects combined with timid characters, who dare not follow out any bold, vigorous, independent train of thought lest it should land them in something which would admit of being considered irreligious or immoral? (p. 61)

Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think. Not that it is solely, or chiefly, to form great thinkers that freedom of thinking is required. On the contrary, it is as much, and even more indispensable, to enable average human beings to attain the mental stature which they are capable of. There have been, and may again be, great individual thinkers, in a general atmosphere of mental slavery. But there never has been, nor ever will be, in that atmosphere, an intellectually active people. (p. 62)

However unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth. (p. 64)

We have hitherto considered only two possibilities: that the received opinion may be false, and some other opinion consequently true; or that the received opinion being true, a conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth. But there is a commoner case than either of these; when the conflicting doctrines, instead of being one true and the other false, share the truth between them; and the nonconforming opinion is needed to supply the remainder of the truth of which the received doctrine embodies only a part. Popular opinions on subjects not palpable to sense are often true, but seldom or never the whole truth. They are a part of the truth; sometimes a greater, sometimes a smaller part, but exaggerated, distorted, and disjoined from the truths by which they ought to be accompanied and limited. Heretical opinions on the other hand are generally some of these suppressed and neglected truths, bursting the bonds which kept them down,

and either seeking reconciliation with the truth contained in the common opinion or fronting it as enemies, and setting themselves up with similar exclusiveness as the whole truth. The latter case is hitherto the most frequent, as in the human mind one-sidedness has always been the rule, and many-sidedness the exception. Hence even in revolutions of opinion, one part of the truth usually sets while another rises. Even progress, which ought to superadd, for the most part only substitutes one partial and incomplete truth for another; improvement consisting chiefly in this, that the new fragment of truth is more wanted, more adapted to the needs of time, than that which it displaces. Such being the partial character of prevailing opinions, even when resting on a true foundation; every opinion which embodies somewhat of the portion of truth which the common opinion omits, ought to be considered precious, with whatever amount of error and confusion that truth may be blended. No sober judge of human affairs will feel bound to be indignant because those who force on our notice truths which we should otherwise have overlooked, overlook some of those which we see. Rather he will think that so long as popular truth is one-sided, it is more desirable than otherwise that unpopular truth should have one-sided asserters too; such being usually the most energetic and the most likely to compel reluctant attention to the fragment of wisdom which they proclaim as if it were the whole. (p. 82-4)

Unless opinions favorable to democracy and to aristocracy, to property and to equality, to cooperation and to competition, to luxury and to abstinence, to sociality and individuality, to liberty and discipline, and all the other standing antagonisms of practical life, are expressed with equal talent and energy, there is no chance of both elements obtaining their due; one scale is sure to go up and the other down. Truth, in the great practical concerns

of life, is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.

On any of the great open questions just enumerated, if either of the two opinions has a better claim than the other, not merely to be tolerated, but to be encouraged and countenanced, it is the one which happens at the particular time and place to be in a minority. That is the opinion which, for the time being, represents the neglected interests, the side of human well-being which is in danger of obtaining less than its share. When there are persons to be found, who form an exception to the apparent unanimity of the world on any subject, even if the world is in the right, it is always probable that dissentients have something worth hearing to say for themselves, and that truth would lose something by their silence. (p. 86-7)

I acknowledge that the tendency of all opinions to become sectarian is not cured by the freest discussion, but is often heightened and exacerbated thereby; the truth which ought to have been, but was not, seen, being rejected all the more violently because proclaimed by persons regarded as opponents. But it is not on the impassioned partisan, it is on the calmer and more disinterested bystander that this collision of opinions works its salutary effect. Not the violent conflict between parts of the truth, but the quiet suppression of half of it, is the formidable evil. (p. 93-4)

It is fit to take some notice of those who say that the free expression of all opinions should be permitted on condition that the manner be temperate, and do not pass the bounds of fair discussion. Much might be said on the impossibility of fixing where these supposed bounds

are to be placed; for if the tests be offence to those whose opinion is attacked, I think experience testifies that this offence is given whenever the attack is telling and powerful, and that every opponent who pushes them hard, and whom they find it difficult to answer, appears to them, if he shows any strong feeling on the subject, an intemperate opponent. But this, though an important consideration in a practical point of view, merges in a more fundamental objection. Undoubtedly the manner of asserting an opinion, even though it be a true one, may be very objectionable and may justly incur severe censure. (p. 95-6)

The gravest of them is to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion. But all this, even to the most aggravated degree, is so continually done in perfect good faith by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible on adequate grounds conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct. (p. 96-7)

James Mill (1773-1836) [2]

Exhortations to resist all powers of government at once should not be considered offenses. Unless a door is left open to resistance of government in the largest sense of the word, the doctrine of passive obedience is adopted; and the consequence is the universal prevalence of misgovernment ensuring the misery and degradation of the people. On the other hand, unless the operations of government, instituted for the protection of rights, are secured from obstruction, the security of rights and all

[2] English historian and philosopher. Excerpts from his "Liberty of the Press" in the *Encyclopedia Brittanica. Supplement.* 6th ed. 1821. Republished in separate form by J. Innes. London. 1825(?)

the advantages dependent upon the existence of government are at an end. Between these two securities, both necessary to obtain the benefits of good government, there appears to be such a contrariety that the one can only be obtained by the sacrifice of the other. . .

The application of physical force which is treated as an evil is clearly distinguishable from that resistance of government which is the last security of the many against the misconduct of the few. . . It is resistance to all the powers of government at once, either to withdraw them from the hands in which they have hitherto been deposited, or greatly to modify the terms upon which they are held. . .

We think it may be satisfactorily shown, that no operation of the press, however directly exhorting to this species of resistance ought to be treated as an offense.

The reason is that no such exhortation can have any immediate or formidable effect; can indeed, have any effect at all, except through such a medium as ought to be, at all times perfectly free. Suppose that a work is published, exhorting the people in general to take arms against the government, for the purpose of altering it against the consent of its rulers. The people cannot take arms against the Government without the certainty of being immediately crushed, unless there has been already created a general consent. If this consent exists in such perfection as to want nothing to begin action but an exhortation, nothing can prevent the exhortation, and forbidding it is useless. If the consent does not exist in nearly the last degree of perfection, a mere exhortation, read in print, can have no effect which is worth regarding. In all circumstances, therefore, it is useless and consequently absurd, to treat this species of exhortations as an offense. If on the other hand, it were clearly recognized, that every man had a license to exhort the people to a general resistance of government, all such exhortations would become ridiculous, unless on those rare and ex-

treme occasions on which no prohibitions, and no penalties can or ought to prevent them. . .

We think it will appear, with sufficient evidence, that in the way of indirect exhortations to resistance that is, in laying the grounds of dissatisfaction with the government, there is no medium between allowing everything, and allowing nothing; that the end, in short, which is sought to be gained, by allowing anything to be published in censure of the government, cannot be obtained without leaving it perfectly free to publish everything.

The end which is sought to be obtained, by allowing anything to be said in censure of the government, is, to ensure the goodness of the government; the most important of all the objects, to the attainment of which, the wisdom of man can be applied. If the goodness of government could be ensured by any preferable means, it is evident that all censure of the government ought to be prohibited. All discontent with the government is only good, insofar as it is a means of removing real cause of discontent. If there is no cause, or if there is better means of removing the cause, the discontent is, of course, an evil and that which produces it an evil.

So true it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent, is, in all civilized countries, among all but the advocates of the misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.

For what is meant by a vicious government? or wherein do the defects of government consist? Most assuredly they all consist in sacrificing the interests of the many to the interests of a few. The small number, in whose hands the powers of government are, in part directly, in part indirectly, placed, cannot fail, like other men, to have a greater regard for what is advantageous to themselves, than what is advantageous to other men. They pursue,

therefore, their own advantage, in preference to that of the rest of the community. That is enough. Where there is nothing to check that propensity, all the evils of misgovernment, that is, in one word, the worst evils by which human nature is afflicted, are the inevitable consequence. . .

We have then arrived at the following important conclusions,—that there is no safety to the people in allowing anybody to choose opinions for them; that there are no marks by which it can be decided beforehand what opinions are true and what are false; that there must, therefore, be equal freedom of declaring all opinions, both true and false; and that, when all opinions, true and false, are equally declared, the assent of the greater number, when their interests are not opposed to them, may always be expected to be given to the true. These principles, the foundation of which appears to be impregnable, suffice for the speedy determination of every practical question. . .

Freedom of discussion means the power of presenting all opinions equally, relative to the subject of discussion; and of recommending them by any medium of persuasion which the author may think proper to employ. If any obstruction is given to the delivering of one sort of opinions, not given to the delivering of another; if any advantage is attached to the delivering of one sort of opinions, not attached to the delivery of another; so far equality of treatment is destroyed, and so far the freedom of discussion is infringed; so far truth is not left to the support of her own evidence; and so far, if the advantages are attached to the side of error, truth is deprived of her chance of prevailing.

To attach advantage to the delivering of one set of opinions, disadvantage to the delivering of another, is to make a choice. But we have already seen, that it is not safe for the people to let anybody choose opinions for them. If it be said, that the people themselves might be

the authors of this preference, what is this but to say, that the people can choose better before discussion than after; before they have obtained information than after it? No, if the people choose before discussion, before information, they cannot choose for themselves. They must follow blindly the impulse of certain individuals, who, therefore, choose for them. This is, therefore, a pretense, for the purpose of disguising the truth, and cheating the people of that choice, upon which all their security for good government depends.

If these deductions are as clear and incontrovertible as to us they appear to be, the inquiry respecting the principles which ought to regulate the use of the press is drawn pretty nearly to its close. We have shown, that as far as regards the violation of the rights of individuals, in respect to both persons and things, no definition on account of the press is required. We have shown in what manner the right of individuals, in regard to reputation, should be defined by the civil code, and the violation of them prevented by the penal. We next proceeded to what may be considered as the main branch of the inquiry, namely, the use of the press in speaking of the institutions and functionaries of government. We have found, that in this respect the freedom of the press is of such importance, that there is no security for good government without it. We have also found, that the use of it, in respect to these subjects, admits but of two useful restrictions; that of a direct exhortation to obstruct any of the operations of government in detail, and that of imputing to a functionary of government a criminal act, which there was no ground, nor even any appearance of ground, to impute to him. These restrictions, of course, it would be very easy to define in the criminal code, and to find appropriate motives to sanction. In all other respects, we have seen that the press ought to be free; that if there is any limit to the power of delivering unfavorable opinions, respecting either the functionaries, or

the institutions of government, and of recommending those opinions by any media, with single exception of false facts, under the circumstances mentioned above, the benefits which may be derived from the freedom of the press are so greatly infringed that hardly any security for good government can remain.

* * *

How can you point out a line where passionate language begins, dispassionate ends? The effect of words upon the mind depends upon the associations which we have with them. But no two men have the same associations with the same words. A word which may excite strains of emotion in one breast, will excite none in another. A word may appear to one man a passionate word, which does not appear so to another. Suppose the legislature were to say, that all censure, conveyed in passionate language, shall be punished, hardly could the vices of either the functionaries or the institutions of government be spoken of in any language which the judges might not condemn as passionate language, and which they would not have an interest, in league with functionaries, to prohibit by their condemnation. The evil, therefore, which must of necessity be incurred by a power to punish language to which the name of passionate could be applied, would be immense. The evil which is incurred by leaving it exempt from punishment is too insignificant to allow that almost anything should be risked for preventing it.

Religion, in some of its shapes, has, in most countries, been placed on the footing of an institution of the state. Ought the freedom of the press to be as complete, in regard to this, as we have seen that it ought to be, in regard to all other institutions of the state? If any one says that it ought not, it is incumbent upon him to show wherein the principles, which are applicable to the other institutions, fail in their application to this.

We have seen, that, in regard to all other institutions, it is unsafe for the people to permit any but themselves to choose opinions for them. Nothing can be more certain, than that it is unsafe for them to permit any but themselves to choose for them in religion.

If they part with the power of choosing their own religious opinions, they part with every power. It is well known with what ease religious opinions can be made to embrace everything upon which the unlimited power of rulers, and the utmost degradation of the people, depend. The doctrine of passive obedience and non-resistance was a religious doctrine. Permit any man, or any set of men, to say what shall, and what shall not, be religious opinions, you make them despotic immediately.

Norman Angell (Ralph Lane) [8]

The small minority imposes itself and can only impose itself by getting first at the mind of the majority—the people—in one form or another: by controlling it through keeping knowledge from it, as in so much of antiquity, or by controlling the knowledge itself. It is because the minds of the mass have failed them, that they have been enslaved. Without that intellectual failure of the mass, tyranny could have found no force wherewith to impose its burdens. (p. 16)

The slavery of antiquity, the slavery of biblical times for instance, made you a slave to a person, a human being, to whose ordinary human sentiments you could appeal. But in the modern world you may at any moment become the slave of an abstraction, a machine. (p. 18)

If we have a vast change in the general ideas of Europe in one particular, in the attitude of men to dogma, to the importance which they attach to it, to their feeling about it, a change which for good or evil is a vast one

[8] Writer and publicist. From his *Why Freedom Matters.* National Council for Civil Liberties. London. 1916.

in its consequences, a moral and intellectual revulsion which has swept away one great difficulty of human relationship and transformed society, it is because the mass, the common folk, have been led to challenge the premises of the learned, of those in authority. By so doing they brought the discussion back to principles so broad and fundamental that the data became the facts of human life and experience—data with which the common man is as familiar as the scholar. And that challenge and discussion authority always at the first regards as blasphemous and impious, and would prevent if it could. And the great event I am here touching upon would seem to suggest that it is correct reasoning about the daily facts of life and experience that is needed before we can hope to apply learning with any advantage—or even without disaster—to such things as the management of society.

The conclusion that it was not the learning of the expert, but common thought upon broad issues, which changed our attitude in this matter does not rest upon obscure or complex historical data. It may be proven by reference to any mind that typifies modern feeling. Most moderns for instance, reject such beliefs as that in the eternal damnation of the unorthodox or of unbaptized infants. Of the present-day millions for whom such a belief would be morally monstrous, how many have been influenced by elaborate study concerning the validity of this or that text? The texts simply do not weigh with them, though for centuries they were the only thing that counted. The things that do weigh with them are profounder and simpler—a sense of justice, compassion—things which would equally have led the man of the sixteenth century to question the texts and the premises of the Church, if discussion had been free. It is because it was not free that the social instinct of the mass, the general capacity so to order their relations as to make it possible for them to live together, became distorted and vitiated. And the wars of religion resulted. To correct

this vitiation, to abolish these disastrous hates and misconceptions, elaborate learning was not needed. Indeed, it was largely elaborate learning which had occasioned them. The judges who burned women alive for witchcraft, or inquisitors who sanctioned that punishment for heresy, had vast and terrible stores of learning. What was needed was that these learned folk should question their premises in the light of facts of common knowledge. It is by so doing that their errors are patent to the quite unlearned of our time. No layman was equipped to pass judgment on the historical reasons which might support the credibility of this or that miracle, on the intricate arguments which might justify this or that point of dogma. But the layman was as well equipped, indeed he was better equipped than the schoolman, to question whether God would ever torture men everlastingly for the expression of honest belief; the observer of daily occurrences, to say nothing of the physicist, was as able as the theologian to question whether a readiness to believe without evidence is a virtue at all. And questions of the damnation of infants, eternal torment, were settled not by the men equipped with historical and ecclesiastical scholarship, but by the average man, going back to the broad truths of life, to first principles, asking very simple questions, the answer to which depended not upon the validity of texts, but upon correct reasoning concerning facts which are accessible to all, upon our general sense of life as a whole, and our more elementary intuitions of justice and mercy, reasoning and intuitions which the learning of the expert often distorts. (p. 23-5)

Now I am suggesting that we are drifting to a condition of institutions calculated to suppress these heresies, to prevent those questions being asked. We believe that it is pernicious that they should be asked at all, and the

power of the State is being used for the purpose of preventing it. What is important is that our welfare and freedom really do depend upon our preserving this right of the individual conscience to the expression of its convictions; this right of the heretic to his heresy. And I base the claim, not upon any conception of abstract 'right'—Jus, Droit, Recht—but upon utility, our needs of heresy, upon the fact that if we do not preserve it, it is not alone the individual heretic who will suffer, but all of us, society. By suppressing the free dissemination of unpopular ideas, we render ourselves incapable of governing ourselves to our own advantage and we shall perpetuate that condition of helplessness and slavery for the mass which all our history so far has shown. (p. 27)

The need of individuality in thought increases in direct ratio to the increasing complexity of our social arrangements. The very fact that we do need more and more unity of Action—regimentation, regulation—in order to make a large population with many needs possible at all, is the reason mainly which makes it so important to preserve variety and freedom of individual thought. If ever we are to make the adjustments between the rival claims of the community and the individual, between national sovereignty or independence and international obligation, between the need for common action and the need for individual judgment, if ever our minds are to be equal to the task of managing our increasingly complex society, we must preserve with growing scrupulousness the right of private judgment in political matters. Because upon that capacity for private judgment, a capacity that can only be developed by its exercise, depends the capacity for public judgment, for political and social success, success, that is, in living together in this world of ours, most largely and most satisfactorily. (p. 29)

John Milton (1608-1674) [1]

Give me the Liberty to know, to utter, and to argue freely according to Conscience, above all Liberties. . .

And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by Licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter?... What a collusion is this, whenas we are exhorted by the wise Man to use diligence, *to seek for Wisdom as for hidd'n treasures* early and late, that another Order shall enjoyn us to know nothing but by statute? When a man hath bin labouring the hardest labour in the deep mines of Knowledge, hath furnisht out his findings in all their equipage, drawn forth his reasons as it were a battell rang'd, scatter'd and defeated all objections in his way, calls out his adversary into the plain, offers him the advantage of wind and sun, if he please, only that he may try the matter by dint of argument; for his opponents then to sculk, to lay ambushments, to keep a narrow bridge of Licencing where the challenger should passe, though it be valour anough in souldiership, is but weaknes and cowardise in the wars of Truth. For who knows not that Truth is strong, next to the Almighty? she needs no policies, nor stratagems, nor licencings to make her victorious, those are the shifts and the defences that Error uses against her power: give her but room, and do not bind her when she sleeps, for then she speaks not true, as the old *Proteus* did, who spake Oracles only when he was caught and bound, but then rather she turns herself into all shapes, except her own, and perhaps tunes her voice according to the time, as *Micaiah* did before *Ahab*, untill she be adjur'd into her own likenes. Yet is it not impossible that she may have more shapes than one.

[1] From *Areopagitica: a Speech to the Parliament of England for the Liberty of Unlicenc'd Printing, by John Milton, with preparatory remarks . . . by T. Holt White, Esq.* . . . p. 171, 174, 175, 176. Printed for R. Hunter. London. 1819.

Jeremy Bentham (1748-1832) [5]

In all liberty there is more or less of danger; and so there is in all power. The question is—in which is there most danger—in power limited by this check, or in power without this check to limit it. In those political communities in which this check is in its greatest vigor, the condition of the members, in all ranks and classes taken together is, by universal acknowledgment, the happiest. (p. 13)

Necessary to instruction—to excitation—in a word, to a state of preparation directed to this purpose [that of changing a government when necessary, and of preventing individual cases of abuse] is—(who does not see it?) the perfectly unrestrained communication of ideas on every subject within the field of government; the communication, by vehicles of all sorts—by signs of all sorts; signs to the ear—signs to the eye—by spoken language—by written, including printed, language—by the liberty of the tongue, by the liberty of the writing desk, by the liberty of the post office—by the liberty of the press. The characteristic then of an undespotic government—in a word, of any government that has any tenable claim to the appellation of a good government is, the allowing, and giving facility to, this communication, and this, not only for instruction and excitation, but also for correspondence; and this again for the purpose of affording and keeping on foot every facility for eventual resistance—for resistance to government, and thence, should necessity require, for a change in government. (p. 24)

As to the evil which results from a censorship, it is impossible to measure it, because it is impossible to tell where it ends.

[5] English philosopher and jurist. From his *On the Liberty of the Press and Public Discussion.* Printed for William Hone. London. 1821.

Leslie Stephen (1832-1904) [6]

I, for one, am fully prepared to listen to any arguments for the propriety of theft or murder, or if it be possible, of immorality in the abstract. No doctrine, however well established, should be protected from discussion. The reasons have been already assigned. If, as a matter of fact, any appreciable number of persons are so inclined to advocate murder on principle, I should wish them to state their opinions openly and fearlessly, because I should think that the shortest way of exploding the principle and of ascertaining the true causes of such a perversion of moral sentiment. Such a state of things implies the existence of evils which cannot be really cured till their cause is known, and the shortest way to discover the cause is to give a hearing to the alleged reasons.

Charles Bradlaugh (1833-1901) [7]

Without free speech no search for truth is possible; without free speech no discovery of truth is useful; without free speech progress is checked and the nations no longer march forward toward the nobler life which the future holds for man. Better a thousand-fold abuse of free speech than denial of free speech. The abuse dies in a day, but the denial slays the life of the people and entombs the hope of the race.

William E. H. Lecky (1838-1903) [8]

If persecution is unnecessary in the defense of truth, it has a fearful efficacy in preventing men from discovering it; and when it is so employed, as infallibility does not exist among mankind, no man can assuredly decide. For truth is scattered far and wide in small portions among mankind, mingled in every system with the dross

[6] English biographer and literary critic.

[7] English free-thinker and social reformer.

[8] Irish historian and publicist. From his *History of the Rise and Influence of the Spirit of Rationalism in Europe*. 7th ed. Vol. II. p. 77-8, 87. Longmans, Green and Co. London. 1875.

error, grasped perfectly by no one, and only in some degree discovered by the careful comparison and collation of opposing systems. To crush some of these systems, to stifle the voice of argument, to ban and proscribe the press, or to compel it to utter only the sentiments of a single sect, is to destroy the only means we possess of arriving at truth. . .

For the object of the persecutor is to suppress one portion of the element of discussion; it is to determine the judgment by an influence other than reason; it is to prevent that freedom of enquiry which is the sole method we possess of arriving at truth. The persecutor never can be certain that he is not persecuting truth rather than error, but he may be quite certain that he is suppressing the spirit of truth.

George Bernard Shaw [9]

It is not possible to make the ordinary moral man understand what toleration and liberty really mean. He will accept them verbally with alacrity, even with enthusiasm, because the word toleration has been moralized by eminent Whigs; but what he means by toleration is toleration of doctrines that he considers enlightened, and, by liberty, liberty to do what he considers right: that is, he does not mean toleration or liberty at all; for there is no need to tolerate what appears enlightened or to claim liberty to do what most people consider right. Toleration and liberty have no sense or use except as toleration of opinions that are considered damnable, and liberty to do what seems wrong.

Robert Hall (1764-1831) [10]

The most capital advantage an enlightened people can enjoy is the liberty of discussing every subject which can

[9] From the preface to *The Showing-up of Blanco Posnet.* Brentano. New York. 1913.

[10] English divine and orator. From his "An Apology for the Freedom of the Press." In his *Works.* 9th ed. Vol. III. Henry G. Bohn. London. 1845.

fall within the compass of the human mind. While this remains, freedom will flourish; but should it be lost or impaired, its principles will neither be well understood nor long retained. To render the magistrate a judge of truth, and engage his authority in the suppression of opinions, shows an inattention to the nature and design of political society—an attempt to distinguish truth from error, to countenance one set of opinions and the prejudice of another, is to apply power in a manner mischievous and absurd. (p. 84)

If we have recourse to experience, that kind of enlarged experience in particular which history furnishes, we shall not be apt to entertain any violent alarm at the greatest liberty of discussion. We shall there see that to this we are indebted for those improvements in arts and sciences which have meliorated in so great a degree the condition of mankind. (p. 85-6)

The law hath amply provided against *overt acts* of sedition and disorder, and to suppress mere opinions by any other method than reasoning and argument is the height of tyranny. Freedom of thought being intimately connected with the happiness and dignity of man in every stage of his being, is of so much more importance than the preservation of any Constitution, that to infringe the former under pretense of supporting the latter, is to sacrifice the means to the end. (p. 96-7)

Herbert Spencer (1820-1903) [11]

It is said that a government ought to guarantee its subjects "security and a sense of security"; whence it is inferred that magistrates ought to keep ears open to the declamations of popular orators, and stop such as are calculated to create alarm. This inference, however, is met by the difficulty that since every considerable change, polit-

[11] English philosopher. From his *Principles of Ethics*. Vol. II. p. 142, 143. D. Appleton & Co. New York. 1900.

ical or religious, is, when first urged, dreaded by the majority, and thus diminishes their sense of security, the advocacy of it should be prevented. . .

Evidently such proposals to limit the right of free speech, political or religious, can be defended only by making the tacit assumption that whatever political or religious beliefs are at the time established, are wholly true; and since this tacit assumption has throughout the past proved to be habitually erroneous, regard for experience may reasonably prevent us from assuming that the current beliefs are wholly true. We must recognize free speech as still being the agency by which error is to be dissipated, and cannot without papal assumption interdict it. . .

It is to the abnormal condition of the body politic that all evils arising from an unrestrained expression of opinion must be attributed, and not to the unrestrained expression itself.

Negative

AMERICAN SOURCES

Alexander Hamilton [1]

I contend that whatever has been said about it . . . amounts to nothing. What signifies a declaration that the "liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in the Constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and the government. . . And here after all, as I intimated on another occasion, we must seek for the only solid basis of our rights.

Simon Backus [2]

To say, therefore, that there is no occasion for the civil magistrate to interfere in matters of religion, is either to contradict plain and demonstrate fact; [as he had just before shown from Holy Writ] or else to charge the divine author of that dispensation with adding the sanction of his approbation and the seal of his authority to a useless and unnecessary institution.

[1] In the *Federalist*, no. 84.

[2] A New England authority. From his protest against a constitution to provide for separation of church and state. *A Dissertation Upon the Right and Obligation of the Civil Magistrate to Take Care of the Interests of Religion and Provide for Its Support.* p. 15.

James Kent (1763-1847) [8]

I am far from intending that these authorities mean, by the freedom of the press, a press wholly beyond the reach of the law, for this would be emphatically Pandora's box, the source of every evil. And yet the house of delegates, in Virginia, by their resolution of the 7th January, 1800, and which appears to have been intended for benefit and instruction of the Union, came forward as the advocates of a press totally unshackled, and declare, in so many words, that "the baneful tendency of the sedition act was but little diminished by the privilege of giving in evidence the truth of the matter contained in political writings." They seem also to consider it as the exercise of a pernicious influence, and as striking at the root of free discussion, to punish, even for a false and malicious writing, published with intent to defame those who administer the government. If this doctrine was to prevail, the press would become a pest, and destroy the public morals. Against such a commentary upon the freedom of the American press, I beg leave to enter my protest. The founders of our governments were too wise and too just, ever to have intended, by the freedom of the press, a right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men, to cherish, for mischievous purposes sedition, irreligion and impurity. Such an abuse of the press would be incompatible with the existence and good order of civil society. The true rule of law is, that the *intent and tendency* of the publication is, in every instance, to be the substantial inquiry on the trial, and that the *truth is admissible in evidence, to explain that intent*, and not in every instance to justify it.

[8] Chief Justice of the Supreme Court of New York, 1804-1814, Chancellor, 1814-1823. In People v. Croswell, 3 Johnson's Cases, 337, commenting on the Virginia resolution on tolerance.

Theodore Roosevelt[4]

The anarchist is the enemy of humanity, the enemy of all mankind, and his is a deeper degree of criminality than any other. . . No paper here or abroad should be permitted circulation in this country if it propagates anarchistic opinions.

George Sutherland[5]

Everything that he (the citizen) has or is, or hopes to be—property, liberty, life—may be required. In time of peace, an attempt to interfere with the least of these would be, and ought to be, resisted to the utmost. In time of war, when the nation is in deadly peril, every freeman who prizes the boon of enduring liberty, will lay them all, freely and ungrudgingly, upon the sacrificial altar of his country.

"Lusk Committee" Report[6]

No matter how imposing are the school buildings, how elaborate the curricula, how sound the text books, the success of the school system depends in the last analysis upon the character and viewpoint of the teachers and instructors who carry out the program, and who influence the pupils with whom they come in contact. It is apparent that these teachers must be acquainted with the forces at play upon public opinion. They must recognize the influences which seek to undermine the confidence and respect which their pupils or students should have for the government and laws of this Commonwealth. They should be trained and eager to combat these influences, and, in order that they may do this, it is essential that

[4] Message to Congress. (United States Senate, Document no. 426. 60th Congress, 1st Session.)

[5] Associate Justice, United States Supreme Court. From his *Constitutional Power and World Affairs*. p. 98-9. Columbia Univ. Press. New York. 1919.

[6] Revolutionary Radicalism: Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activities. Filed April 24, 1920 in the Senate of the State of New York. J. B. Lyon Co., printers. Albany, 1920.

they themselves shall be in full accord and sympathy with our form of government and the system of society under which we live. . . Having these considerations in mind, the Committee has recommended that a law[7] be placed upon the statute books of this State which shall require the teachers in public schools to secure, before the first of January, 1921, a special certificate certifying that they are persons of good character and that they are loyal to the institutions of the State and Nation. (Vol. I. p. 16)

In entering the public school system the teacher assumes certain obligations and must of necessity surrender some of his intellectual freedom. If he does not approve of the present social system or the structure of our government he is at liberty to entertain those ideas, but must surrender his public office. If a change in our social system or in the structure of our government is at any time demanded by the people of this State or of the United States, the mandate must be disclosed by the verdict of the polls. The public school must not be allowed to spread the gospel of discontent among the people. No person who is not eager to combat the theories of social change should be entrusted with the task of fitting the young and old of this State for the responsibilities of citizenship. (Vol. III. p. 2343)

John L. Tildsley[8]

No person who adheres to the Marxian program, the program of the Left Wing of the Socialist Party in this country, should be allowed to become a teacher in the public school system, and if discovered to be a teacher, should be compelled to sever his connection with the school system, for it is impossible for such a person to carry out the purpose of the public schools as set forth

[7] Such a law was enacted in 1921, but was repealed in 1923.

[8] Associate Superintendent of Schools of New York. Quoted in the *New York Times*, from statement made by him April 26, 1919, in a speech before the Public Education Association.

by Commissioner Finegan, that the public schools of any country should be the expression of the country's ideals, the purpose of its institutions, and the philosophy of its life and government.

The right to freely utter and publish whatever the citizen may please and to be protected against responsibility for so doing except so far as such publications for their blasphemy, obscenity, or scandalous character may be a public offense, or as by their falsehood and malice may injuriously affect the standing, reputation, or pecuniary interest of individuals.—*Freedom of the press in* 1791.—*Cooley. "Constitutional Limitations."*

Liberty of the press means no more than a freedom for everything to pass from the press without a license . . . from any authority . . . but this does not imply the liberty of reviling and calumniating.—*Chief Justice of Massachusetts,* 1767. *P. Hildreth. "History." Vol. V. p.* 166.

EUROPEAN SOURCES

William Blackstone, 1723-1780[1]

. . . idea and practice of political and religious liberty flourish in their highest vigor in these kingdoms, where it falls little short of perfection. (Commentaries. Vol. I. p. 126)

All these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints – restraints in themselves so gentle and moderate as will appear upon further inquiry that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do everything that a good man would desire to do; and are

[1] English jurist, famous for his *Commentaries on the Laws of England.*

restrained from nothing but what would be pernicious either to ourselves or our fellow citizens. (Vol. 1. p. 140)

In this, and in other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels are punished by the English law, some with greater, others with less degrees of severity, the liberty of the press, properly understood, is by no means infringed or violated.

The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraint upon publication, and not in freedom of censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish, as the law does at present, any dangerous or offensive writings which, when published, shall on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order of government and religion, the only solid foundations of civil liberty. (Vol. IV. p. 151)

Everything is now as it should be with respect to the spiritual cognizance, and spiritual punishment of heresy; unless perhaps that the crime ought to be more strictly defined, and no persecution permitted even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion that the officers of the church should have

power to censure heretics, yet not to harass with temporal penalties, much less to exterminate or destroy them. (Vol. IV. p. 49)

Baruch (Benedict de) Spinoza (1632-1677) [2]

. . . The individual justly cedes the right of free action, though not of free reason and judgment. No one can act against the authorities without danger to the State, though his feelings and judgment be at variance therewith. He may even speak against them, provided that he does so from rational conviction, not from fraud, anger, or hatred, and provided that he does not attempt to introduce any change on his private authority. . . Thus we see how an individual may declare and teach what he believes, without injury to the authority of his rulers, or to the public peace; namely, by leaving in their hands the entire power of legislation as it affects action; and by doing nothing against their laws though he be compelled often to act in contradiction to what he believes, and openly feels to be best. From the fundamental notions of a state, we have discovered how a man may exercise free judgment without detriment to the supreme power; from the same premises we can no less easily determine what opinions would be seditious. Evidently those which by their very nature nullify the compact by which the right of free action is ceded. . .

John Calvin (1509-1564) [3]

There are two sorts of seditious men, and against both these must the sword be drawn; for they oppose the King and God himself. . . First they find out corruptions in the Government, as a matter of grievance, which they expose to the people. Secondly, they petition for Redress

[2] Dutch philosopher.

[3] Swiss divine and reformer. Quoted by Sir Rober l'Estrange, in *"A Seasonable Memorial in Some Historical Notes Upon the Liberties of the Press and Pulpit."*

of those Grievances still asking more and more, till something is denied them. And then, Thirdly, they take the power into their own hands of Relieving themselves, but with Oaths and protestations that they act only for the Common Good of King and Kingdom. From the pretense of defending the Government, they proceed to the Reforming of it; which reformation proves in the end to be a Final Dissolution of the order both of Church and State. . . Their consciences widened with their interest. . . First, they fell upon the King's Reputation; they invaded his authority in the next place; after that they assaulted his Person, seized his Revenue; and in the conclusion most impiously took away his Sacred Life. . . The Transition is so natural from Popular Petition to a Tumult, that the one is but a Hot Fit of the other; and little more than a more earnest way of petitioning. . . They Preach the People into murther, sacrilege, and Rebellion; they pursue a most gracious Prince to the scaffold; they animate the Regicides, calling that Execrable villainy an act of Public Justice, and entitling the Holy Ghost to Treason.

Samuel Johnson [4]

I introduced the subject of toleration. JOHNSON. "Every society has a right to preserve public peace and order, and therefore has a good right to prohibit the propagation of opinions which have a dangerous tendency. To say the *magistrate* has this right, is using an inadequate word: it is the *society* for which the magistrate is agent. He may be morally or theologically wrong in restraining the propagation of opinions which he thinks dangerous, but he is politically right." MAYO. "I am of opinion, Sir, that every man is entitled to liberty of conscience in religion; and that the magistrate cannot restrain that right." JOHNSON. "Sir, I agree with you.

[4] From Boswell's *Life of Johnson*, edited by George Birkbeck Hill. 6v. The Clarendon Press. Oxford. 1887.

Every man has a right to liberty of conscience, and with that the magistrate cannot interfere. People confound liberty of thinking with liberty of talking; nay, with liberty of preaching. Every man has a physical right to think as he pleases; for it cannot be discovered how he thinks. He has not a moral right, for he ought to inform himself, and think justly. But, Sir, no member of a society has a right to *teach* any doctrine contrary to what the society holds to be true. The magistrate, I say, may be wrong in what he thinks: but while he thinks himself right, he may and ought to enforce what he thinks." MAYO. "Then, Sir, we are to remain always in errour, and truth never can prevail; and the magistrate was right in persecuting the first Christians." JOHNSON. "Sir, the only method by which religious truth can be established is by martyrdom. The magistrate has a right to enforce what he thinks: and he who is conscious of the truth has a right to suffer. I am afraid there is no other way of ascertaining the truth, but by persecution on the one hand and enduring it on the other." (Vol. II. p. 249-50).

MAYO. "But, Sir, is it not very hard that I should not be allowed to teach my children what I really believe to be the truth?" JOHNSON. "Why, Sir, you might contrive to teach your children *extra scandalum:* but, Sir, the magistrate, if he knows it, has a right to restrain you. Suppose you teach your children to be thieves?" MAYO. "This is making a joke of the subject." JOHNSON. "Nay, Sir, take it thus:—that you teach them the community of goods; for which there are as many plausible arguments as for most erroneous doctrines. You teach them that all things at first were in common, and that no man had a right to any thing but as he laid his hand upon it; and that this still is, or ought to be, the rule amongst mankind. Here, Sir, you sap a great principle in society,—property. And don't you think the magistrate would have a right to prevent you? Or, sup-

pose you should teach your children the notion of the Adamites, and they should run naked into the streets, would not the magistrate have a right to flog 'em into their doublets?" MAYO. "I think the magistrate has no right to interfere till there is some overt act." BOSWELL. "So, Sir, though he sees an enemy to the state charging a blunderbuss, he is not to interfere till it is fired off?" JOHNSON. "The magistrate is to judge of that. He has no right to restrain your thinking, because the evil centers in yourself. If a man were sitting at this table, and chopping off his fingers, the magistrate, as guardian of the community, has no authority to restrain him, however he might do it from kindness as a parent. Though, indeed, upon more consideration, I think he may; as it is probable, that he who is chopping off his own fingers, may soon proceed to chop off those of other people. If I think it right to steal Mr. Dilly's plate, I am a bad man; but he can say nothing to me. If I make an open declaration that I think so, he will keep me out of his house. If I put forth my hand, I shall be sent to Newgate. This is the gradation of thinking, preaching, and acting: if a man thinks erroneously, he may keep his thoughts to himself, and nobody will trouble him; if he preaches erroneous doctrine, society may expell him; if he acts in consequence of it, the law takes place, and he is hanged." MAYO. "But, Sir, ought not Christians to have liberty of conscience?" JOHNSON. "I have already told you so, Sir. You are coming back to where you were." BOSWELL. "Dr. Mayo is always taking a return post-chaise, and going to the stage over again. He has it at half price." JOHNSON. "Dr. Mayo, like other champions for unlimited toleration, has got a set of words. Sir, it is no matter, politically, whether the magistrate be right or wrong. Suppose a club were to be formed, to drink confusion to King George the Third, and a happy restoration to Charles the Third, this would be very bad with respect to the State; but every member of that club must either conform to

its rules, or be turned out of it. Old Baxter, I remember, maintains, that the magistrate should 'tolerate all things that are tolerable.' This is no good definition of toleration upon any principle; but it shows that he thought some things were not tolerable." TOPLADY. "Sir, you have untwisted this difficult subject with great dexterity." (Vol. II. p. 251-3).

Baron de Montesquieu [5]

It is true, that in democracies the people seem to do what they please; but political liberty does not consist in unrestrained freedom. In governments, that is in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will.

We must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit; and if a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow-citizens would have the same power. (Chap. III. Book II. p. 161. "In What Liberty Consists.")

In countries where liberty is most esteemed, there are laws by which a single person is deprived of it in order to preserve it for the whole community. Such are in England what they call "bills of attainder." These are relative to those Athenian laws by which a private person was condemned, provided they were made by unanimous suffrage of 6,000 citizens. They are relative to those laws which were made at Rome against private citizens and were called privileges. These were never passed but in the great meetings of the people. But in what manner soever they are enacted, Cicero is for having them abolished because the force of law conflicts in its being made for the whole community. I must own,

[5] Charles Louis de Secondat, Baron de la Brède et de Montesquieu. From his *The Spirit of Laws*: tr. by Thomas Nugent. new ed. rev. by J. V. Prichard. George Bell & Sons. London. 1878.

notwithstanding, that the practice of the freest nation that ever existed, induces me to think that there are cases in which a veil should be drawn for a while over liberty, as it was customary to veil statues of the gods. (Chap. XIX. Book 12. p. 214. "In What Manner the Use of Liberty Is Suspended in a Republic.")

Sir James Fitzjames Stephen [6]

To me the question whether liberty is a good or a bad thing appears as irrational as the question whether fire is a good or a bad thing? It is both good and bad according to time, place, and circumstance, and a complete answer to the question, In what cases is liberty good and in what cases is it bad? would involve not merely a universal history of mankind, but a complete solution of the problems which such a history would offer. I do not believe that the state of our knowledge is such as to enable us to enunciate any "very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control." We must proceed in a far more cautious way, and confine ourselves to such remarks as experience suggests about the advantages and disadvantages of compulsion and liberty respectively in particular cases. (p. 48-9)

Let us turn to the consideration of the other side of the question, and enquire whether there are no cases in which a degree of coercion, affecting, though not directly applied to, thought and the expression of opinion, and not in itself involving an evil greater than the evil avoided, may attain desirable ends. I think that such cases exist and are highly important. In general terms I think that the legal establishment and disestablishment of various forms of opinion, religious, political, and moral, their encouragement and recognition by law and public opinion as being true and useful, or their dis-

[6] From his *Liberty, Equality, Fraternity.* 350p. Smith, Elder & Co. London. 1873.

couragement by law and public opinion as being false and mischievous, fall within this principle. I think, that is, that they are cases of coercion of which the object is or may be good, and in which the coercion is likely to be effective, and is not an evil great enough to counterbalance the evil which is avoided or the good which is attained. I think, in short, that Governments ought to take the responsibility of acting upon such principles, religious, political, and moral, as they may from time to time regard as most likely to be true, and this they cannot do without exercising a very considerable degree of coercion. The difference between, I do not say keeping up an Established Church at the public expense, but between paying a single shilling of public money to a single school in which any opinion is taught of which any single taxpayer disapproves, and the maintenance of the Spanish Inquisition, is a matter of degree. As the first cannot be justified without infringing the principle of liberty as stated by Mr. Mill, so the last can be condemned on my principles only by showing that the doctrines favoured by the Inquisition were not true, that the means used to promote them were ineffective, or that their employment was too high a price to pay for the object gained; issues which I should be quite ready to accept. (p. 52-3)

The real question is as to social intolerance. Has a man who believes in God and a future state a moral right to disapprove of those who do not, and to try by the expression of that disapproval to deter them from publishing, and to deter others from adopting their views? I think that he has if and in so far as his opinions are true. Mr. Mill thinks otherwise. He draws a picture of social intolerance and its effects which nothing but considerations of space prevent me from extracting in full. It is one of the most eloquent and powerful passages he ever wrote. The following is its key-note:—

Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them, or to abstain from

any active efforts for their diffusion. With us heretical opinions do not perceptibly gain or even lose ground in each decade or generation; they never blaze out far and wide, but continue to smoulder in the narrow circles of thinking and studious persons among whom they originate without ever lighting up the general affairs of mankind with either a true or a deceptive light. And thus is kept up a state of things very satisfactory to some minds, because, without the unpleasant process of fining or imprisoning anybody, it maintains all prevailing opinions outwardly undisturbed, while it does not absolutely interdict the exercise of reason by dissentients afflicted with the malady of thought. A convenient plan for having peace in the intellectual world and keeping all things going on therein very much as they do already. But the price paid for this sort of intellectual pacification is the sacrifice of the entire moral courage of the human mind.

The heretics, says Mr. Mill, are grievously injured by this, and are much to be pitied, but "the greatest harm is done to those who are not heretics, and whose whole mental development is cramped and their reason cowed by the loss of heresy. Who can compute what the world loses in the multitude of promising intellects combined with timid characters, who dare not follow out any bold, vigorous, independent train of thought lest it should land them in something which would admit of being considered irreligious or immoral?"

On this point I am utterly unable to agree with Mr. Mill. It seems to me that to publish opinions upon morals, politics, and religion is an act as important as any which any man can possibly do; that to attack opinions on which the framework of society rests is a proceeding which both is and ought to be dangerous. I do not say that it ought not to be done in many cases, but it should be done sword in hand, and a man who does it has no more right to be surprised at being fiercely resisted than a soldier who attacks a breach. (p. 76-7)

Proclamation of the King, 1626[7]

"That neither in Doctrine nor Discipline of the Church nor in the Government of the State will he admit of the

[7] In Rushworth's *Historical Collection of Private Passages of State*, etc. Vol. I. p. 412. London. 1721.

least innovation," and, therefore, commanding that "neither by Writing, Preaching, Printing, Conferences, or otherwise, they raise, publish or maintain any other Opinions concerning Religion, than such as are clearly warranted by the Doctrine and Discipline of the Church of England, established by authority.—And enjoineth his Reverend Archbishops and Bishops in their several Dioceses, speedily to reclaim and repress all such spirits, as shall in the least degree attempt to violate this Bond of Peace; and all the Ministers of Justice were required to execute his Majesty's Pious and Royal pleasure herein expressed; and if any shall take the boldness to neglect this gracious admonition, His Majesty will proceed against such offenders with that severity as their contempt shall deserve, that by their exemplary punishment others may be warned and that those that be studious of the peace and prosperity of this church and Commonwealth may bless God for his Majesty's pious, religious, wise and gracious Government."

Bishop Horsley,[8] on January 30, 1793, delivered a sermon before the House of Lords, wherein he indulged in a severe censure of that "Freedom of dispute" on matters of "such high importance as the origin of government and the authority of sovereigns," in which he laments that it has been the "folly of this country for several years past" to indulge. Of the divine right of Kings he declared: "It is a right which in no country can be denied, without the highest of all treason. The denial of it were treason against the paramount authority of God."

* * *

"That freedom of dispute in which for several years past it hath been the folly of this country to indulge upon matters of such high importance as the origin of govern-

[8] Samuel Horsley, Lord Bishop of St. Asaph. This sermon is included in his *Sermons*, new ed. printed for William Baynes & Son, London, and H. S. Baynes, Edinburgh. 1827.

ment and the authority of sovereigns . . . this forwardness to dispute about the limits of the sovereign power, and the extent of the people's rights . . . argues it should seem that something is forgotten . . . it surely is forgotten that the Christian is possessed of a written rule of conduct delivered from on high. . .

"Civil society . . . is the condition to which God originally destined man; whence the obligation on the citizen to submit to government is an immediate result of that first principle of religious duty which requires that man conform himself, as far as in him lies, with the will and purpose of his maker. The governments which now are have not arisen from a previous state of no government, falsely called a state of nature; but from that original government, variously changed and modified . . . to suit . . . the infinitely varied manners and conditions of its inhabitants. And the principle of subjection is . . . a conscientious submission to the will of God."

"The liberty of the press is dear to England," said his Lordship. "The licentiousness of the press is odious to England. The liberty of it can never be so well protected as by beating down the licentiousness. . . I said that the liberty of the press was dear to Englishmen, and I will say that nothing can put that in danger but the licentiousness of the press." This is the very commonplace way of talking, by all those who desire to conceal their aversion to the democracy of unabridged intellectual opportunity. A little further on his Lordship defines liberty of the press thus: "It is neither more or less than this, that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes what is blamable."—*Comment by Sir James Fitzjames Stephen, on Lord Kenyon's eulogy of the "liberty" of the press. R. v. Cuthill, 27 State Trials,* 674.

THE LAW

A. The Constitutional Guarantees

AFFIRMATIVE

Amendments to the Constitution of the United States

Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Article IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Treason Clause of Constitution of the United States

Article III. Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work

corruption of blood, or forfeiture except during the life of the person attained.

The Declaration of Independence (1776)

We hold these truths to be self-evident; that all men are created equal; that they are endowed, by their Creator, with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. . . All experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security.

Act of Virginia Establishing Religious Freedom (1786)

To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all liberty; because he being, of course, judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own. It is time enough for the rightful purposes of civil government for

its officers to interfere when principles break out into overt acts against peace and good order.—*Approved by United States Supreme Court in Reynolds vs. U.S.*, 98 *U.S.* 163.

Kentucky and Virginia Resolutions, 1798, 1799

The Virginia resolutions of 1798 and the Kentucky resolutions of 1798 and 1799 were outcomes of the discussion over the Alien and Sedition Laws. The legislature of Kentucky in November, 1798, adopted a set of resolutions, the original draft of which had been prepared by Jefferson. A set of resolutions prepared by Madison, then a member of the Virginia legislature, was adopted in December, 1798. Copies of each set of resolutions were transmitted to the governors of the various states to be laid before the legislature. Replies were made by the legislatures of New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, and Delaware, and in each case were "decidedly unfavorable." In 1799 Kentucky reaffirmed its adherence to the doctrine of the resolutions in 1798, and added another resolution. In Virginia the replies of the State legislatures were referred to a committee, of which Madison was chairman, which made an elaborate report January 7, 1800.

KENTUCKY RESOLUTION OF 1798

* * *

III. Resolved, that it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people;" and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States, or to the people:

That thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their

useful freedom, and how far those abuses which cannot be separated from their use should be tolerated rather than the use be destroyed; and thus also they guarded against all abridgment by the United States of the freedom of religious opinions and exercise, and retained to themselves the right to protecting the same, as this State, by a law passed on the general demand of its citizens, had already protected them from all human restraint or interference:

And that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, defamation equally with heresy and false religion, are withheld from the cognizance of Federal tribunals. That therefore the act of the Congress of the United States passed on the 14th day of July, 1798, entitled "An act in addition to the act for the punishment of certain crimes against the United States," which does abridge the freedom of the press, is not law, but is altogether void and of no effect.

IX. Resolved, lastly, that the Governor of this Commonwealth be, and is hereby authorized and requested to communicate the preceding Resolutions to the Legislatures of the several States, to assure them that this Commonwealth considers Union for specified National purposes, and particularly for those specified in their late Federal Compact, to be friendly to the peace, happiness, and prosperity of all the States: that faithful to that compact according to the plain intent and meaning in which it was understood and acceded to by the several parties, it is sincerely anxious for its preservation: that it does also believe, that to take from the States all the powers of self-government, and transfer them to a general and consolidated government, without regard to the special delegations and reservations solemnly agreed to in that compact, is not for the peace, happiness, or prosperity of these States: And that, therefore, this Commonwealth is determined, as it doubts not its co-States are, tamely to submit to undelegated and consequently unlimited powers in no man or body of men on earth: that if the acts before specified should stand, these conclusions would follow from them:

That the general government may place any act they think proper on the list of crimes and punish it themselves, whether enumerated or not enumerated by the Constitution as cognizable by them:

That they may transfer its cognizance to the President or any other person, who may himself be the accuser, counsel, judge, and jury, whose suspicions may be evidence, his order the

sentence, his officer the executioner, and his breast the sole record of the transaction;

That a very numerous and valuable description of the inhabitants of these States being by this precedent reduced as outlaws to the absolute dominion of one man, and the barrier of the Constitution thus swept away from us all, no rampart now remains against the passions and the powers of a majority of Congress, to protect from a like exportation or other more grievous punishment the minority of the same body, the legislatures, judges, governors, and counselors of the States, nor their other peaceable inhabitants who may venture to reclaim the constitutional rights and liberties of the State and people, or who for other causes, good or bad, may be obnoxious to the view or marked by the suspicions of the President, or be thought dangerous to his or their elections or other interests, public or personal:

That the friendless alien has indeed been selected as the safest subject of a first experiment, but the citizen will soon follow, or rather has already followed: for, already has a sedition act marked him as its prey:

That these and successive acts of the same character, unless arrested on the threshold, may tend to drive these States into revolution and blood, and will furnish new calumnies against Republican governments, and new pretexts for those who wish to be believed, that man cannot be governed but by a rod of iron:

That it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism; free government is founded in jealousy and not in confidence; it is jealousy and not confidence which prescribes limited Constitutions to bind down those whom we are obliged to trust with power; that our Constitution has accordingly fixed the limits to which and no further our confidence may go; and let the honest advocate of confidence read the alien and sedition acts, and say if the Constitution has not been wise in fixing limits to the government it created, and whether we should be wise in destroying those limits.

THE VIRGINIA RESOLUTIONS

That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution in the two late cases of the "Alien and Sedition Acts" passed at the last session of Congress; the first of which exercises a power nowhere delegated to the Federal Government, and which, by uniting legislative and judicial powers to those of (the) executive, subvert the general principles of free government, as well as the particular organization and positive provisions of the Federal Constitution; and the other of which acts exercises, in like manner, a power not delegated by the Constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto,—a power which, more than any other, ought to

produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

That this State having by its Convention which ratified the Federal Constitution expressly declared that, among other essential rights, "the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, having, with other States, recommended an amendment for that purpose which amendment was in due time annexed to the Constitution,—it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were not shown to the palpable violation of one of the rights thus declared and secured, and to the establishment of a precedent which may be fatal to the other.

NEGATIVE

Reply Made by the Legislature of Massachusetts to the Kentucky and Virginia Resolutions

The legislature of Massachusetts, although they do not themselves claim the right nor admit the authority of any of the state governments to decide upon the constitutionality of the acts of the Federal government, still, lest their silence should be construed into disapprobation, or at best into a doubt of this constitutionality of the acts referred to by the State of Virginia; and as the General Assembly of Virginia, has called for an expression of their sentiments, do explicitly declare that they consider the acts of Congress commonly called "the Alien and Sedition Acts" not only constitutional, but expedient and necessary. That the former act respects a description of persons whose rights were not particularly contemplated in the Constitution of the United States who are entitled only to a temporary protection, while they yield a temporary allegiance,—a protection which ought to be withdrawn, whenever they become "dangerous to the public safety," or are found guilty of "treasonable machinations" against

the government. That Congress having been especially entrusted by the people with the general defence of the nation, had not only the right, but were bound to protect it against internal as well as external foes.

That the United States at the time of passing the Act concerning Aliens, were threatened with actual invasion, had been driven by the unjust and ambitious conduct of the French government into warlike preparations expensive and burthensome, and had then within the bosom of the country, thousands of aliens, who, we doubt not, were ready to co-operate in any external attack.

The Sedition Act, so called, is in the opinion of this legislature, equally defensible. The General Assembly of Virginia, in their resolve under consideration, observe, that when that state by its convention ratified the Federal Constitution, it expressly declared, "That among other essential rights, the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, with other states recommended an amendment for that purpose, which amendment was in due time annexed to the Constitution but they did not surely expect that the proceedings of their state convention were to explain the amendment adopted by the union. The words of that amendment on this subject are, "Congress shall make no law abridging the freedom of speech or of the press."

The act complained of is no abridgment of the freedom of either. The genuine liberty of speech and the press, is the liberty to utter and publish the truth—but the constitutional right of the citizen to utter and publish the truth, is not to be confounded with the licentiousness in speaking and writing, that is only employed in propagating falsehood and slander. This freedom of the press has been explicitly secured by most if not all the state constitutions; and of this provision there has been gen-

erally but one construction among enlightened men; that it is a security for the rational use and not the abuse of the press; of which the courts of law, the juries and the people will judge; this right is not infringed, but confirmed and established by the late act of Congress.

The President of the United States is bound by his oath, "to preserve, protect, and defend the Constitution," and it is expressly made his duty, "to take care that the laws be faithfully executed"; but this would be impracticable by any created being, if there could be no legal restraint of those scandalous misrepresentations of his measures and motives, which directly tend to rob him of the public confidence. And equally impotent would be every other public officer, if thus left to the mercy of the seditious.

It is holden to be a truth most clear, that the important trusts before enumerated, cannot be discharged by the government to which they are committed, without the power to restrain or punish seditious practices and unlawful combinations against itself, and to protect the officers thereof from abusive misrepresentations. Had the Constitution withheld this power, it would have made the government responsible for the effects, without any control over the causes which naturally produce them, and would have essentially failed of answering the great ends for which the people of the United States declare in the first clause of that instrument, that they establish the same, viz. "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessing of liberty to ourselves and posterity."

Seditious practices and unlawful combinations against the Federal government or any officer thereof in the performance of his duty, as well as licentiousness of speech and of the press, were punishable on the principles of common law in the courts of the United States, before the act in question was passed. This act then is an

amelioration of that law in favour of the party accused, as it mitigates the punishment which that authorizes, and admits of any investigation of public men and measures which is regulated by truth. It is not intended to protect men in office, only as they are agents of the people. Its object is to afford legal security to public offices and trusts created for the safety and happiness of the people, and therefore the security derived from it is for the benefit of the people and is their right.

Resolution Adopted by the State of New York, in Senate, March 5th, 1799

Whereas the people of the United States have established for themselves, a free and independent national government.

And whereas it is essential to the existence of every government, that it have authority to defend and preserve its constitutional powers inviolate, inasmuch, as every infringement thereof tends to its subversion.

And whereas the judicial power extends expressly to all cases of law and equity arising under the constitution and the laws of the United States, whereby the interference of the legislatures of the particular states in those cases is manifestly excluded.

And whereas our peace, prosperity and happiness, eminently depend on the preservation of the union, in order to preserve which, a reasonable confidence in the constituted authorities and chosen representatives of the people is indispensible.

And whereas every measure calculated to weaken that confidence, has a tendency to destroy the usefulness of our public functionaries, and to excite jealousies equally hostile to rational liberty, and the principles of a good republican government,—

And whereas the Senate not perceiving that the rights of the particular states have been violated, nor any un-

constitutional powers assumed by the general government, cannot forbear to express the anxiety and regret with which they observe the inflammatory and pernicious sentiments and doctrines which are contained in the resolutions of the legislatures of Virginia and Kentucky; sentiments and doctrines no less repugnant to the Constitution of the United States and the principles of their union, than destructive to the Federal government, and unjust to those whom the people have elected to administer it.

B. Laws Restricting Freedom of Opinion

The California, Pennsylvania, Indiana and Kansas statutes given here are typical of the new anti-free speech laws enacted by thirty-four states, for the most part since 1917. The criminal anarchy and sedition laws were patterned after the New York act passed in 1902 after the assassination of President McKinley. The constitutionality of these laws was upheld by the U.S. Supreme Court in 1925 in Gitlow v. New York (266 U.S. 652). The constitutionality of certain sections of the criminal syndicalism laws (making a crime of mere membership in or meeting with an organization) has not yet (January, 1927) been passed upon by the United States Supreme Court.

In addition to the sedition and criminal syndicalism laws, twenty-eight states have adopted anti-red-flag laws similar to the Kansas statute. All of them were passed since 1917.

The Massachusetts blasphemy act and the Mississippi social equality law are examples of the extremes to which this type of legislation may go. The Massachusetts act was passed in 1697 and is still on the statute books. A prosecution was brought under it in 1926. No prosecutions have been brought under the Mississippi law. The Tennessee anti-evolution law, passed in 1925, shows the recent tendency toward legislative restrictions on freedom of teaching. Mississippi enacted a similar law in 1926.

The Sedition Law of 1798[1]

The Sedition Law of 1798 provided:

Section 2. . . That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any

[1] Repealed in 1801.

unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars and by imprisonment not exceeding two years.

The Sedition Law marked the beginning of the political landslide which in 1800 swept the Federalist party out of power, and ultimately out of existence. It was as definitely repudiated by the President and Congress as it had been by the people. Jefferson at once pardoned all those convicted under it. In answer to a complaint from Mrs. John Adams, Jefferson wrote in 1804:

I discharged every person under punishment or prosecution under the Sedition Law, because I considered, and now consider, that law to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.—*F. Wharton, "State Trials of the United States", p. 721.*

The California Criminal Syndicalism Act [2]

An act defining criminal syndicalism and sabotage, prescribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefor.

I. *"Criminal syndicalism"* defined. The term "criminal syndicalism" as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

[2] Laws, 1919. c. 188.

II. *Unlawful acts. Penalty.* Any person who:

1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

2. Willfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

5. Willfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

Is guilty of a felony and punishable by imprisonment in the state prison not less than one or more than fourteen years.

The Pennsylvania Anti-Sedition Act[3]

Section 1. Be it enacted &c., That the word "sedition", as used in this act, shall mean:

[3] Laws of 1919, Chap. 639, as amended by Laws of 1921, Chap. 211.

Any writing, publication, printing, cut, cartoon, utterance, or conduct, either individually or in connection or combination with any other person or persons, the intent of which is:

(a) To make or cause to be made any outbreak or demonstration of violence against this State or against the United States.

(b) To encourage any person or persons to take any measures or engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or of the United States.

(c) To incite or encourage any person or persons to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt.

(d) To incite any person or persons to do or attempt to do personal injury or harm to any officer of this State or of the United States, or to damage or destroy any public property or the property of any public official because of his official position.

It shall also include:

(e) The actual damage to, or destruction of, any public property or the property of any public official, perpetrated because the owner or occupant is in official position.

(f) Any writing, publication, printing, cut, cartoon, or utterance which advocates or teaches the duty, necessity, or propriety of engaging in crime, violence or any form of terrorism, as a means of accomplishing political reform or change in government.

(g) The sale, gift or distribution of any prints, publications, books, papers, documents, or written matter in any form, which advocates, furthers or teaches sedition as hereinbefore defined.

(h) Organizing or helping to organize or becoming a member of any assembly, society, or group, where any

of the policies or purposes thereof are seditious as hereinbefore defined.

SECTION 2. *Punishment for Sedition*—Sedition, as defined in section one of this act, shall be a felony, and any person convicted thereof shall be sentenced to a fine not less than one hundred dollars ($100) and not more than ten thousand dollars ($10,000), and to imprisonment not exceeding twenty years, either or both, in the discretion of the court.

THE INDIANA ANTI-ANARCHY ACT[4]

PREAMBLE:

WHEREAS. While liberty within the reasonable restraints of law, and the right of free speech, are among the inalienable rights of the American citizen, and no encroachment upon either should ever be tolerated, the claim to those rights should never be allowed to cover treasonable acts or utterances, the advocacy of anarchy, the overthrow of government, or the abrogation of constitutional means for the maintenance of law and order and the protection of the lives and rights of persons, or the advocacy of or the practice of sabotage; and

Whereas, Recent occurrences in Russia and elsewhere warn us that the toleration of such unbridled license of speech and of such practices involves great danger to civilization and to organized society, and threatens a possible lapse into barbarism; therefore,

SECTION 2718a. *Prohibiting the display of certain banners, emblems.* (1) The display or exhibition at any meeting, gathering or parade, public or private, of any flag, banner or emblem symbolizing or intended by the person or persons displaying or exhibiting the same to symbolize a purpose to overthrow, by force or violence, or by physical injury to personal property, or by the general cessation of industry, the government of the

[4] Laws of 1919, p. 588. Secs. 2718a, et seq.

United States or (of) the State of Indiana, or all government, is hereby declared to be unlawful.

Section 2718b. *Prohibiting the inciting of violence.* (2) It shall be unlawful for any person to advocate or incite or to write or with intent to forward such purpose to print, publish, sell, or distribute any document, book, circular, paper, journal or other written or printed communication in or by which there is advocated or incited the overthrow by force or violence, or by physical injury to personal property, or by the general cessation of industry, of the government of the United States, of the State of Indiana, or all government.

Section 2718c. *Penalty for violation.* (3) *Any* person or persons convicted of violating any section of this act shall be fined not more than $5,000 or imprisoned for not more than five years, or both.

Red Flag Law of Kansas[5]

Making it a felony to display a flag distinctive of Bolshevism, Anarchy or Radical Socialism; declaring any violation thereof a felony and providing penalties.

Be it enacted by the Legislature of the State of Kansas:

Section 1. That hereafter it shall be unlawful for any person or persons, organization or body of persons to fly, to carry, to exhibit or to display, or to assist in carrying or exhibiting or displaying in the State, any red flag, standard or banner distinctive of Bolshevism, Anarchy or Radical Socialism, or any flag, standard or banner of any color or design, that is now or may hereafter be designated by any Bolshevistic, anarchistic or radical socialistic group, body or association, or society of persons as the flag, standard or banner of Bolshevism, Anarchy or Radical Socialism.

Section 2. That any person or persons who shall violate any provision of section one of this act shall upon

[5] Laws of 1919, p. 244, Chap. 184.

conviction of such violation be punished by imprisonment in the State Penitentiary for the period of not less than eighteen months nor more than three years.

Blasphemy Act of Massachusetts[6]

Whoever wilfully blasphemes the holy name of God by denying, cursing, or contumeliously reproaching God, his creation, government or final judging of the world, or by cursing or contumeliously reproaching Jesus Christ or the Holy Ghost, or by cursing or contumeliously reproaching or exposing to contempt and ridicule, the holy word of God contained in the holy scriptures shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars, and may also be bound to good behavior.

Tennessee Anti-Evolution Law[7]

An Act prohibiting the teaching of the evolution theory in all the universities, normals, and all other public schools of Tennessee, which are supported in whole or in part by the public school funds of the State, and to provide penalties for the violation thereof.

Section 1. Be it enacted by the General Assembly of the State of Tennessee; that it shall be unlawful for any teacher in any of the universities, normals, and all other public schools in the State which are supported in whole or in part by the public school fund of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.

Section 2. Be it further enacted; that any teacher found guilty of a violation of this Act, shall be guility of a misdemeanor, and upon conviction shall be fined not

[6] General Laws, Chap. 272, Sec. 36—Enacted 1697.
[7] Public Acts, Chap. 27, 1925.

less than one hundred ($100.00) dollars, nor more than five hundred ($500.00) dollars for each offense.

SECTION 3. Be it further enacted; that this act take effect from and after its passage, the public welfare requiring it.

MISSISSIPPI SOCIAL EQUALITY LAW [8]

An Act to make it a misdemeanor to print or publish or circulate printed or published appeals or presentations of arguments or suggestions favoring social equality or marriage between the white and negro races.

Social Equality Between Races—Advocacy of Punished

Be it enacted by the Legislature of the State of Mississippi:

SECTION 1. That any person, firm or corporation who shall be guilty of printing, publishing or circulating printed, typewritten or written matter urging or presenting for public acceptation or general information, arguments or suggestions in favor of social equality or of intermarriage between whites and negroes, shall be guilty of a misdemeanor and subject to a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both fine and imprisonment in the discretion of the court.

SECTION 2. That this act take effect and be in force from and after its passage.

[8] Chap. 214, Senate Bill no. 198.

THE ATTITUDE OF THE COURTS

A. Court Decisions

AFFIRMATIVE

The fundamental right of free men to strive for better conditions through new legislation and new institutions will not now be preserved, if efforts to secure it by argument to fellow-citizens may be construed as criminal incitement to disobey the existing law,—merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning, or intemperate in language. No objections more serious than these can, in my opinion, reasonably be made to the arguments presented in "The Price We Pay."—*From the dissenting opinion of Mr. Justice Brandeis in Pierce v. United States,* (1919, 252 *U.S.* 239) *in which Mr. Justice Holmes concurred, the Court sustaining a conviction under the Espionage Act for publishing an anti-war pamphlet entitled "The Price We Pay."*

The statute is said to have been enacted by the state under its police power to preserve the peace; but it is in fact an act to prevent teaching that the abolition of war is possible. Unlike the Federal Espionage Act of June 15, 1917, it applies equally whether the United States is at peace or at war. It abridges freedom of speech and of the press, not in a particular emergency, in order to avert a clear and present danger, but under all circumstances. The restriction imposed relates to the teaching of the doctrine of pacifism, and the legislature in effect proscribes it for all the time.

That such a law is inconsistent with the conceptions of liberty hitherto prevailing seems clear. But it is said that the guaranty against abridging freedom of speech, contained in the First Amendment of the Federal Constitution, applies only to Federal action; that the legislation here complained of is that of a state; that the validity of the statute has been sustained by its highest court as a police measure; that the matter is one of state concern; and that, consequently, this court cannot interfere.

But the matter is not one merely of state concern. The state law affects directly the functions of the Federal government. It affects rights, privileges and immunities of one who is a citizen of the United States; and it deprives him of an important part of his liberty. These are rights which are guaranteed protection by the Federal Constitution; and they are invaded by the statute in question. . .

The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of Federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and to this end, to teach the truth as he sees it. Were this not so "the right of the people to assemble for the purpose of petitioning Congress for a redress of grievances or for anything else connected with the powers or duties of the national government" would be a right totally without substance. . .
—*From the dissenting opinion of Mr. Justice Brandeis in Gilbert v. Minnesota,* (1920, 254 *U.S.* 325) *in which the Court sustained a conviction for utterances under the Minnesota sedition law of* 1917. *(In this case the Chief Justice also dissented upon other grounds.)*

In this case sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as

the government has to publish the Constitution of the United States now vainly invoked by them. . .

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free-trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.

Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be externally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . .

Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here; but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.—*From the dissenting opinion of Mr. Justice Holmes in Abrams v. United States,* (1919, 250 *U.S.* 616) *in which Mr. Justice Brandeis concurred, the Court sustaining a conviction under the Espionage Act for publishing two leaflets protesting against the American military expedition to Siberia in* 1918.

The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men

not merely for disloyal acts, but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance. To prosecute men for such publications reminds of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act had in effect restored the crime of constructive treason.

To hold that such harmless additions to or omissions from news items, and such impotent expressions of editorial opinion, as were shown here, can afford the basis even of a prosecution, will doubtless discourage criticism of the policies of the government. To hold that such publications can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities.

Nor will this grave danger end with the passing of the war. The constitutional right of free speech has been declared to be the same in peace and in war. In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal, opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief.—*From the dissenting opinion of Mr. Justice Brandeis in Schaefer v. United States,* (1919, 251 *U.S.* 466) *in which Mr. Justice Holmes concurred, the Court sustaining a conviction under the Espionage Act for anti-war editorials in the Philadelphia Tageblatt,* 1917.

Mr. Justice Brandeis and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat

larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right then I think that the criterion sanctioned by the full Court . . . (in the Schenck case) applies: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that (the State) has a right to prevent." It is true that in my opinion this criterion was departed from in Abrams v. United States . . . but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and Schaefer v. United States . . . have settled the law.

If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object

would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.—*From the dissenting opinion of Mr. Justice Holmes in Gitlow v. New York,* (1925, 268 *U.S.* 652) *in which Mr. Justice Brandeis concurred, the Court sustaining a conviction under the New York Criminal Anarchy Act of* 1901, *for a Manifesto published in* 1919 *in the Revolutionary Age.*

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. *The United States Supreme Court in Ex-parte Milligan,* 4 *Wall.* 2, 1863.

The right of the people peaceably to assembly for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, (in Gibbons v. Ogden, 9 Wheat 211) "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the states to afford it protection.—*The United States Supreme Court in upholding the right of assemblage, in United States v. Cruikshank,* (1875). 92 *U.S.* 542.

NEGATIVE

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

* * *

That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question.

* * *

Thus it was held by this Court in the Fox case, that a state may punish publications advocating and encouraging a breach of its criminal laws; and, in the Gilbert case, that a state may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

* * *

And for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional state. "Freedom of speech and press," said Storey, "does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. . . " It does not protect publications prompting the overthrow of government by force: the punishment of those who publish articles which tend to destroy organized society being essential

to the security of freedom and the stability of the state. . . And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. . . In short this freedom does not deprive a state of the primary and essential right of self preservation: which so long as human governments endure, they cannot be denied. . . In Toledo Newspaper Co. v. United States it was said: "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."

* * *

By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. . .

And the case is to be considered "in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare"; and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the state in the public interest". . . That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances by their very nature involve danger to the public peace and to the security of the state.

They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration.

It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. . . "Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the state were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the state unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and pur-

pose as to bring it within the prohibition of the statute. . . In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent.

* * *

It was not necessary, within the meaning of the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should have been advocated. Nor

was it necessary that the language should have been "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular. —*From the opinion delivered by Justice Sanford in Gitlow v. New York,* (1925, 268 *U.S.* 652) *sustaining a conviction under the New York Criminal Anarchy Act for the publication of a Manifesto in the "Revolutionary Age" in* 1919.

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right. . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights.—*From a decision of the United States Supreme Court delivered in Scheneck v. United States.* (1909, 249 *U.S.* 47) *sustaining an Espionage Act conviction for utterances.*

The First Amendment while prohibiting legislation, against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.—*From a decision of the United States Supreme Court in Frohwerk v. United States,* (1919, 249 *U.S.* 204, 206) *sustaining an Espionage Act conviction for an article in the "Missouri Staats-Zeitung."*

When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied.—*From a decision of the United States Supreme Court in Patterson v. Colorado* (1907, 205 *U.S.* 454, 463) *sustaining a conviction for contempt of court for publishing articles criticizing the Colorado State Supreme Court.*

The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions.—*From a decision of the United States Supreme Court in Toledo Newspaper Co. v. United States* (1918, 247 *U.S.* 402, 419), *sustaining a conviction for contempt of court in publishing a newspaper article criticizing the Court.*

Gilbert's remarks were made in a public meeting. They were resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder and intimations of violence. And such is not an uncommon experience. On such occasions feeling usually runs high and is impetuous; there is a prompting to violence and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such result or a danger of it is a proper exercise of the power of the state.—*From a decision of the United States Supreme Court in Gilbert v. Minnesota* (1920, 254 *U.S.* 325, 331), *the court sustaining the Minnesota wartime sedition act.*

Freedom of Speech [1]

During the late war there were numerous convictions under the Espionage Act, wherein the law of free speech

[1] *Revolutionary Radicalism*: Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activities. Vol. III. Chap. II. p. 2024-33. J. B. Lyon Co., printers. Albany, 1920.

was very clearly defined by the Supreme Court of the United States, and we will in this chapter—in order to make clear the line of demarcation which exists between free speech as defined by the Constitution of the United States and that abuse of free speech, the use of which constitutes a crime against our statutes—briefly review the law applicable thereto.

Article I, section 8 of the Constitution of the State of New York, in its first sentence, provides as follows:

> Every citizen may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right;* and no law shall be passed to restrain or abridge the liberty of speech or of the press. . .

The first Amendment to the Constitution of the United States reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

These constitutional provisions are, of course, sacred to the American people and they safeguard rights of the most transcendent importance; but when those provisions were written into our constitutions, the framers thereof had in mind the thought that self-preservation was a primal right of nations, as of men, and that the exercise of free speech was intended for the perpetuation of a free government and not for the destruction thereof. It is these constitutional provisions that, strangely, have been invoked by those persons in the community who have attempted to pervert them and who have attempted to use these provisions as a cloak for the preaching of the doctrine that organized government should be overthrown by force and violence.

The Court of Appeals of this State, in construing the above quoted provision of our State Constitution, and defining the meaning of free speech (Judge Van writing

the opinion, in the case of People v. Most, 171 N.Y. 423, at p. 431), used the following language:

While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the Legislature may control and the courts may punish the licentiousness of the press. "The liberty of the press," as Chancellor Kent declared in a celebrated case, "consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects governments, magistracy or individuals." (People v. Croswell, 3 Johns. Cas. 336, 393.) Mr. Justice Story defined the phrase to mean "that every man shall have a right to speak, write or print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the Government." (Story's "Commentaries on the Constitution," Sec. 1874.)

The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. It does not shield a printed attack on private character, for the same section from which the above quotation is taken expressly sanctions criminal prosecution for libel. It does not permit the advertisement of lotteries, for the next section prohibits lotteries and the sale of lottery tickets. It does not permit the publication of blasphemous or obsene articles, as the authorities uniformly hold. (People v. Ruggles, 8 Johns, 290, 297; People v. Muller, 96 N.Y. 408; In re Rapier, 143 U.S. 110.) It places no restraint upon the power of the Legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the State of the unbridled license, nor authorize the publication of articles prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn as not sanctioned by the constitution of any state appeals designed to destroy the reputation of the citizen, the peace of society or the existence of the government. (Story on Const., Chap. 1878; Cooley on Const. Lim., 518; Ordronaux on Constitutional Legislation, 237; Tiedeman on Police Powers, Chap. 81.) We think that no constitutional right of the defendant was violated by his conviction and that the judgment pronounced against him was rendered in accordance with law.

* * *

In the case of Berkman and Goldman, the notorious anarchists who were recently deported from the United States, the claim was advanced by the defendants that their prosecution was an infringement on the right of free speech guaranteed by the Constitution. The fact of the matter was that Berkman and Goldman counselled disobedience to the Selective Service Law and urged their hearers not to register and not to obey the provisions of the said law; and Judge Mayer, in the United States District Court, in charging the jury in the Berkman-Goldman case, used the following language:

> This is not a trial of political principles. This cannot be turned into a political or state trial in the political sense. You are not to be misled by any effort to digress your mind from the real issue, which simply is, whether these defendants are guilty or not guilty of the crime charged in the indictment.
>
> This is not a question of free speech. Free speech is guaranteed to us under the Constitution. No American worthy of the name believes in else than free speech; but free speech means, not license, not counseling disobedience of the law; free speech means that frank, free, full and orderly expression which every man or woman in the land, citizen or alien, may engage in, in lawful and orderly fashion; and that free speech is guaranteed to us, and no court would deny it to anyone.

On June 15, 1917, the Espionage Law was passed, with the object of reaching not only those persons who might be engaged in espionage and to protect our country and industrial resources, but also to prevent any unlawful interference with the Nation's efforts to raise an army and navy. Section 3 of that Act provided:

> Whoever when the United States is at war shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

. . . Eugene V. Debs was one of the "two thousand Socialists" who were arrested following the passage of the Espionage Act. Debs at a public meeting so couched his language that it was apparent that his purpose was to

paralyze the Government of the United States in its endeavor to raise an army for the defense of the Nation. It was urged in his behalf at the time of his trial that he had committed no violation of law, that he was simply exercising the privileges of a free citizen, and that his utterances were protected under the provisions of the first Amendment to the Federal Constitution.

Mr. Justice Holmes, of the United States Supreme Court, writing the opinion in the Debs case, for a unanimous court, used the following forceful language:

> The main theme of the speech was Socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service, and if in passages such encouragement was indirectly given, the immunity of the general theme may not be enough to protect the speech.

And then, after quoting from this speech, Mr. Justice Holmes, at another part of the opinion, said:

> The statement was not necessary to warrant the jury in finding that one purpose of the speech—whether incidental or not does not matter—was to oppose not only war in general, but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended, and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.

* * *

In the case of the People against Louis C. Fraina, 255 Federal Reporter, p. 28, et seq., the United States Circuit Court of Appeals of the Second Circuit, Judge Hough writing the opinion, used the following language:

> The mental attitude evident through the conduct of defense below, and argument here, is suggested rather than plainly stated by the points that it was error to permit the jury to infer guilt from the speeches, that in so doing defendants were tried for their words, and such procedure invades the right of free speech.
>
> We think the contention may be thus summed up: If there was a meeting of minds, it was not actually productive of any breach of peace; no one was shown to have refused physical obedience; it was all words; and men cannot constitutionally and

lawfully be punished for words, especially when the language relates to rights based on the moral sense i.e., the "idealism," of the "non-religious conscientious objector."

The matter at bottom is political, not legal. Men can be punished for words, if the legislature so decrees, within constitutional limits. Men commit crimes when they counsel or procure others to sin against the statute law, and they also commit crimes when they confederate to effect that object, and yet it is difficult to imagine any more suitable or usual method of procuring or counselling than by speech. In this inaccurate sense men have very often been punished for words by statutory enactment.

The free speech secured federally by the first amendment means complete immunity for the publication by speech or print of whatever is not harmful in character, when tested by such standards as the law affords. For these standards we must look to the common law rules in force when the constitutional guarantees were established and in reference to which they were adopted. By legislative action the boundaries of unpunishable speech have doubtless and often been much enlarged; but the constitutional limit remains unchanged, and what the legislature has done it can undo. Legal talk-liberty never has meant, however, "the unrestricted right to say what one pleases at all times and under all circumstances." Warren v. United States, 183 Fed., at 721, 106 C. C. A. 156, 33, L. R. A. (N. S.) 800. Nothing said to the jury by the court below in this case went beyond the limits thus stated, and there was no error.

Complaint as to inferring guilt from speeches, or letting men be found guilty therefrom, when or if the speeches only expressed moral principles and social aspirations, is really objecting to the statutes. The statutes in question here, like most others, are of general application; they must be so unless exceptions of equal authority are also statutory. They operate alike on the religious, the atheist and the unthinking.

* * *

The foregoing decisions clearly establish the proposition that self-defense is the primal right of a free nation—that a nation has the right to punish either written or spoken attempts to undermine its existence, and that the constitutional provisions, both state and federal, with regard to free speech, do not protect that abuse of free speech, the object of which is the destruction of the weakening of the nation. Those misguided apologists for revolutionary radicalism who would place no curb whatever upon speech, have evidently lost sight of these fundamental principles of government. . .

The Circuit Court of Appeals for the Eighth Circuit, in the case of Warren v. the United States, 193 Fed. Rep. 718, at p. 721, very aptly said:

> Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances, and certainly they do not mean that contrary to the will of Congress one may make of the post office establishment of the United States an agency for the publication of his views of the character and conduct of others, as distinguished from the carriage of the mails. The very idea of government implies some imposition of restraint in the interest of the general welfare, peace and good order. The statute under consideration is a part of a body of legislation which is being gradually enlarged, and which is designed to exclude from the mails that which tends to debauch the morals of the people, or is contrived to despoil them of their property or is an apparent, visible attack upon their good names. The competency of Congress is beyond question, and the courts have uniformly upheld the legislation and applied it in the light of its evident purposes.

The chief criticism of those persons in the community who oppose the enforcement of the Criminal Anarchy statute of this state is that it does not require an "overt act" for the consummation of the crime there defined, and that it is sought to punish persons for their opinions, their idea apparently being that the mere counselling of force and violence, without the actual commission of an act of violence, is not criminal. The fallacy of this argument is apparent on a moment's reflection, for really, what more overt act is needed than the urging or counselling or advising another that organized government should be overthrown by force and violence? It is in this way that riots are started—picturing of fancied wrongs, the appeal to the mob spirit, and then the mob in action. . .

U. S. Supreme Court Upholds Right of a State to Protect Its Own Existence[2]

The significance of the decision of the Supreme Court in the Gitlow case can best be understood by a brief outline of the facts in it. In the late winter and spring of

[2] From the review of the Benjamin Gitlow case; criticism of the editorial appearing in *The Independent* for June 20, 1925, by Archibald E. Stevenson, Chairman of the Committee on Free Speech, National Civic Federation. From circular issued by the Federation.

1919, a large group in the membership of the Socialist Party of America, wishing to bring about an immediate revolt against the Government of the United States in emulation of the policy of the Russian Communist Party, created what they called the Left Wing Section of the Socialist Party and after several conferences chose a National Council of which Benjamin Gitlow was a member. This Council was directed to prepare, and did draft a manifesto setting forth the revolutionary purposes and methods of the Left Wing Section including a definite appeal for recruits for the revolutionary forces. The manifesto was adopted at a meeting of the Council on June 26, 1919, and on July 5 of that year was published in a paper owned by the Left Wing Section and known as the *Revolutionary Age*. Benjamin Gitlow was the business manager of that paper and caused the publication and circulation of the manifesto. The object of the Left Wing Section as stated in the manifesto was to point out "the oppressive character" of the "Capitalist Government of the United States," the inadequacy of the political measures adopted by the Socialist Party, and to make clear that the Left Wing Section stood for the destruction of the Government by the mass action of the proletariat. The manifesto advocated using the political mass strike as one of its weapons and indicated, as characteristic of its preliminary measures, the methods adopted by the One Big Union in the Province of Manitoba in seizing the municipal government of Winnipeg in 1919. It was also a document designed to recruit the forces of the Left Wing Section to augment its numbers in order that it should be sufficiently powerful to carry out its designs.

Gitlow was convicted in the Supreme Court of the State of New York under a statute designed to protect the people of that state in their right to select their own form of government. His crime was advocating the overthrow of that form of government by force and violence through the act of a minority. . . The majority

opinions in this case announce no new principle and make no change in long accepted views on this subject. As we have pointed out, there is no criminal quality attaching to the advocacy of a change in the form of the Government of the United States. A citizen may believe and preach that the Soviet form of government is superior to the Government of the United States and that the Constitution should be amended by lawful means to establish such form of government in this country. The criminality attaching to the advocacy of change arises only when the method by which such change is to be effected is unlawful. One of the cardinal necessities for the maintenance of civil liberty is the continuance of order and peace in the community and the fundamental requisite for the maintenance of republican government in democratic form is to permit the majority of citizens to express their will not only in legislation, but also in respect of the form of government under which they live.

For this reason, an attempt to organize a minority for the purpose of coercing the majority, either by force of arms or by the use of the general strike, into submitting to a change in the form of government which change they may disapprove or abhor is an act which constitutes the highest crime against the principles of civil liberty and democratic government. The fact that the revolution which Gitlow and his associates sought to precipitate had not yet reached the point where an actual attempt to overthrow the Government had taken place did not minimize his guilt. The Federal Supreme Court held that a state has the right to punish an attempt to organize revolution as fully as it has the right to suppress rebellion after it has broken out. The logic of such a position, both from a legal and from a common sense point of view, should be obvious.

Let me make this point clear by a homely illustration. Suppose that a neighbor of mine had threatened to burn

down my house and, while I was sitting on my front porch, I saw him carrying loads of straw and placing them about my home and pouring gasoline on it. If the law prevented my interfering with his action until he had touched a lighted match to the combustibles, my property would receive no protection from the law. If the state has the right to suppress an armed rebellion it is puerile to contend that it must stand by while viewing the making of plans and the recruiting of forces for such rebellion without moving in its own defense. The Supreme Court has made it clear that the effort to recruit forces for the purpose of using violence against the state, although such recruiting is but by word of mouth or in writing, is as much an overt act in the furtherance of rebellion as the firing of the first shot.

The dissenting opinion of Mr. Justice Holmes, setting forth his own and Mr. Justice Brandeis's view of the case with which *The Independent* confesses itself to be in accord, does not commend itself to sound reason. "If the publication of this document," says Mr. Justice Holmes, "had been made as an attempt to induce an uprising against government at once and not at some indefinite time in the future, it would have presented a different question." From this we infer that to organize rebellion against the Government is not criminal unless the rebels have announced the date upon which it is to be started. The manifesto of the Left Wing Section of the Socialist Party (Communists) upon which Benjamin Gitlow was convicted set forth in unmistakable terms the intention to capture and destroy the Government if possible through the use of the general strike and extra-parliamentary procedure. In furtherance of this design, it called upon the workers to join that party *immediately* in order that its forces should be sufficiently recruited to make possible the attempt to carry out its purposes. No prudent rebel ever authorized the use of violence until he was convinced his forces were sufficiently strong to inspire a hope that his cause would be successful.

Mr. Justice Holmes brushes aside this view with the following statement:

> It is said that this manifesto was more than theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.

The expression of these views suggests that the learned Justice has failed to consider that an idea may be either beneficent or criminal. If a beneficent idea expressed with eloquence sets fire to reason, we may be thankful. If, on the other hand, a criminal idea is expressed in the form of an incitement, it is an incitement to crime and, as such, it should be punished.

B. Injunctions

This discussion for and against injunctions in industrial conflict is included because of the widespread belief that denial of fundamental civil liberties is incident to such injunctions. Labor injunctions may limit or forbid picketing, appeals to strike or to join a union, parades, mass meetings, strike orders, "unfair" lists and general appeals to help labor by not dealing with hostile employers. This discussion necessarily covers the whole field of the activities of labor as they come before the courts.

The workers claim that freedom of speech, press and assemblage is useless if it cannot be used for their purposes in industrial conflict. Those who are satisfied with labor injunctions deny that they present any questions of civil liberty. Such questions rarely come to the front in judges' opinions, which are chiefly concerned with damages to employers' property and business.

OBJECTIONS TO LABOR INJUNCTIONS[1]

I. The Powers of a Single Judge Sitting in Equity Without a Jury in Civil Cases Are Tolerable Only in the Domain of Private Rights. They are the most absolute and summary powers permitted to any individual under our system of government. A judge without jury decides facts as well as law, assesses and awards money damages, and applies or withholds the drastic remedy of injunction. An injunction is a command—literally royal in its origin—to do or not to do certain acts. It must be obeyed even if wrongfully issued. It must be obeyed even by persons not entitled to offer objections to its issuance. If its issuance is based upon misconstruction of facts, there is usually no effective correction. If based on a wrong view of law (as understood by the appellate court) it may be reversed. Meanwhile, however, it may have done its work; for it must

[1] By Walter Nelles, Counsel for the American Civil Liberties Union, 100 Fifth Avenue, New York City.

in the interim be obeyed. Disobedience is contempt of court, punishable by fine or imprisonment as if for crime, except that it may be more serious for there is no definite limit of amount or duration. Punishment is without conviction by a jury, and often on affidavits alone, without hearing witnesses, and without effective review on appeal.[2]

These powers retain a strong flavor of their origin in the prerogative of the British Crown in the period of the Crown's nearest approach to absolutism. The British Lord Chancellor, who administered equity, was an executive minister of the Crown—only incidentally a judge. His Court of Chancery survived the successive crises in the evolution of democracy in England as the Crown itself survived them—by cultivating moderation. It restricted its use of its drastic powers to cases of private property rights, decided on principles consistent with the common law.[3] Only twice has British equity ventured to interfere between capital and labor,—and since 1906 has been sharply restrained by provisions of the Trade Disputes Act under which such injunctions as issue freely in this country are impossible.[4]

In this country, equity powers were so repugnant to republican feeling that it was not until towards the middle of the nineteenth century that they were generally fully established.[5] Their establishment was aided by the wise moderation of such judges as Chancellor Kent of New York, who held that the "peremptory and powerful" process of injunction ought not to be used "but with the utmost caution. It is the strong arm of the court: and to render its operation benign and useful, it must be exer-

[2] On the importance of trial by jury, see argument of Jeremiah Black in *Ex Parte Milligan*, 4. Wall, U.S. 2.

[3] Joseph Story, *Equity Jurisprudence*, secs. 49, 51, p. 18-20; Sayre, *Cases on Labor Law*, p. 717; W. C. Holdsworth, *History of English Law*.

[4] Sidney and Beatrice Webb, *History of Trade Unionism*, 1920 ed. p. 600, 606; Sayre, p. 718, 723n, 24.

[5] Story, *Equity Jurisprudence*, Sec. 56; Charles Warren, *History of the American Bar*.

cised with great discretion, and when necessity requires it."[6] It was not, of course, foreseen that it would invade the field of political government.

II. The Questions of Private Right Involved in Labor Injunction Cases Are Overshadowed by Questions of Public Policy. "The most difficult of all political arrangements is that of so adjusting the claims of the two classes [propertied and unpropertied] as to give security to each, and promote the welfare of all." It requires "all the wisdom of the wisest patriots."[7] In the protests against "government by injunction" with which labor injunctions were met in the nineties, "it was urged that the real motive in seeking the injunction was not ordinarily to prevent property from being injured or to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men. In other words, that under the guise of protecting property rights, the employer was seeking sovereign power. And many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the State on one side or the other according to principles deduced from that law; that the problem of the control of industry demanded a solution of its own; and that pending the ascertainment of new principles to govern industry, it was wiser for the state not to interfere in industrial struggles by the issuance of an injunction."[8]

In the enormous disproportions of power which combinations of capital have brought about in this country, the only way in which, without fundamental changes in the nature and policy of our government, the "security of each and welfare of all" may be protected is through

[6] *Attorney General v. Utica,* 2 Johns. Chan. 371.

[7] James Madison, quoted in Elliott's *Debates,* 1881 ed. vol. V, p. 580.

[8] Brandeis, J., dissenting, in *Truax v. Corrigan,* 257 U.S. 312; Sayre, 232.

the development of an organized labor power approximately balancing the power of organized capital. The breaking of strikes and unions by injunction tends to prevent such a balance.

III. The Assumption by Courts of Equity of Injunctive Jurisdiction in Labor Disputes Was Due Rather to the Pressure of a Political or Class Bias Than to Compulsion of Their Own Principles

The most incorruptible integrity on the bench "is not incompatible with a certain bias of the mind." Judges are chosen from lawyers of standing at the bar, and standing is attained by devoted service to important property interests. It is extraordinary when a judge can slough off the prepossessions which his practice has engendered. The political nonpartisanship for which judges are sometimes extolled may be due to their higher devotion to property—a devotion which tends to admirable impartiality in decisions between one property interest and another, but has a contrary effect when the issue is between property and persons.

In the criminal prosecutions for "conspiracy to impoverish" employers or non-union workmen by which property sought protection from labor before the injunctions era, judges generally encouraged and upheld convictions. Criminal prosecution of unions broke down because of the reluctance of juries to convict and public indignation when they did.[9] But the vigorous summary manner in which certain federal judges in the seventies and eighties put down strikes on insolvent railways in their hands through the receivers, showed employing interests what advantage they might gain if the labor troubles of solvent employers also could be brought within reach of the same strong arm.[10]

[9] John R. Commons and Associates, *History of Labor in the United States*. Vol. I. p. 138-52, 404-12; Vol. II. p. 444 ff.

[10] 7 Bissell, 513, 520, 529; 24 Fed. 217; 23 Fed. 748, 757; Matilda Gresham, *Life of Walter Q. Gresham*, p. 384ff.

The point was gained. Labor injunctions appeared in the eighties and became established in the nineties.[11] It would be extravagant to say that situations between employers and employes present no analogy with cases of private right between man and man in which injunctions are granted to prevent (1) *injury to property,* (2) which would be *irreparable* if continued, (3) because the acts causing it are *unlawful.* But this principle is not in labor cases compelling. "It was asserted that in these proceedings an alleged danger to property, always incidental and at times insignificant, was often laid hold of to enable the penalties of the criminal law to be enforced expeditiously without that protection to the liberty of the individual which the Bill of Rights was designed to afford."[12]

(1) The alleged injury to property in a labor case is usually not injury to *tangible* property; the property protected is the intangible "good-will" of a business, the expectation of continued good relations with customers and workmen and resulting profits. For equity to protect intangible good-will was not unprecedented, but it was novel. That the innovation is sometimes beneficial is shown in cases of unfair commercial competition, as where equity forbids a manufacturer to imitate a rival manufacturer's labels. The innovation is still incomplete. Most courts still decline to issue injunctions to protect a business from irreparable injury by defamation as by saying falsely that it is insolvent. The very court which first protected good-will from strike activities had only lately declined to protect it from defamation.[13]

(2) It is possible that a business may be *irreparably* injured by labor activities. But courts ignore an equal possibility that it may not be. Business has its ups and downs. On an upward wave, labor demands may be granted or compromised and the cost passed on to con-

[11] John R. Commons, *History of Labor in the United States.* Vol. II, p. 502-9.

[12] Brandeis, J., *op. cit.*

[13] *Sherry v. Perkins,* 147 Mass. 212, Sayre, 724, & note, 723-4; *Boston Diatite Co. v. Florence Mfg. Co.,* 114 Mass. 69.

sumers. On downward waves, when labor troubles are most apt to become acute, employers may have a positive interest in suspending or curtailing production, and may actually court a strike as a means of weakening or breaking a union. It may be questioned how frequently labor troubles are allowed to become acute when no real or fancied interest of the employer is deemed by him to be on the whole served by them. Further, in conjecturing the probable scope of the employer's injury, his loss from a lawful strike as a whole is coupled with whatever loss may be properly ascribed to particular unlawful strike activities. And there is no off-set of the irreparable injuries which obstruction of a lawful strike may cause the strikers in *their* intangible property right to such increased wages or shorter hours as the condition of the business may make reasonable.

(3) Whatever the injury to the employer's property, if its cause is not *unlawful,* it must "go as part of the inevitable friction of society," and there should be no injunction; nor should injunctions reach persons who are not parties to the unlawfulness. A study of the holdings outlined under the next heading will show that

IV. Decisions of Unlawfulness and of Collective Responsibility for It Are Due Less to Evidence Than to the Political or Class Bias of Judges.

The material on this subject is so vast that it is here impossible to more than indicate points, with references,—which include arguments by astute and powerful minds *against* the points here suggested.

Violence. On this and all other concrete questions of fact, decision rests on affidavits, invariably biased on both sides,—and if not perjured, highly colored by lawyers to the limit of professional conscience. Whatever violence is proved, common sense cannot refuse to believe, though law may, that every large body of strikers

include some law-abiding men. Even if prominent strikers are identified as concerned in violence, it does not follow that they were not hired or instigated to it by the employer's private detectives in order to get a cause for an injunction. But on slight evidence of strikers' violence, an injunction, with its stigma of crime, goes against the entire striking union. This stigma is usually the main point. For courts of equity are not efficient in police duty; it may be questioned whether injunctions have ever prevented a single act of violence; they are known to have provoked many.[14] The practical point of the charges and findings of violence is to discredit the strike. Additional findings and sweeping injunctive provisions which by themselves might raise an outcry then pass almost unnoticed.

Intimidation. Picketing. To win a lawful strike, access to strike-breakers is important. Violence is the least effective form of pressure. Real workmen who have accepted strike-breaking jobs are best reached by appeals to their honor and threats of social obloquy. "Intimidation" or "coercion," without force or fraud, is not unlawful at common law.[15] The law itself imposes manifold coercions; moral duty, public opinion, private need, many others. An employer's use of a man's urgent needs to induce him to accept strike-breaking employment is not less coercive than the strikers' use of considerations of shame to induce him to abandon it. Feelings run high in strikes. The stake is men's livelihood. Strike-breakers' lives are often made a burden. The precise line at which their rights are invaded is shadowy. Assume it to be crossed. How do their rights become their employer's? He is injured when a strike-breaker is *lawfully* persuaded to join the strike. How does he acquire rights then, when pressure upon the strike-breaker is unlawful? That a

[14] Coeur d'Alene, *Political Science Quarterly.* 10: 193; most of the violence in the Pullman strike followed the injunction, Commons, *History of Labor in the United States.* Vol. II. p. 502; E. E. Witte, *Journal of Political Economy.* 32: 335-40.

[15] J. H. Wigmore, *American Law Review.* 21: 509 ff.

strike, like an election, puts additional burdens upon the police force, is irrelevant. Why should the entire body of strikers be held responsible for clashes which are ascribed to some of their number? How can acts normally lawful be included in the injunction?

Sometimes the presence merely of more than one or two pickets is held intimidatory. "Picket" is a military word; in some states all picketing is held unlawful. Labor men feel that the real object of an injunction is to prevent strikers from doing anything whatsoever which may substantially help their lawful success.[16]

Inducing Breach of Contract. Even judges who inveigh most loosely against "coercion" by labor unions entertain no doubt of the voluntary character of workmen's acceptance of the "Yellow Dog" contract, by which they agree not to join a union while they remain in the employ. The length to which an injunction may go to prevent solicitation of men so bound to join in a union is shown in the famous Hitchman case.[17] Not only the irreparableness, but even the existence of legal injury to the employer in these cases is more than commonly debatable.

Imputed Unlawful Purpose. Such things as violence, intimidation, and inducing breach of contract are deemed unlawful in themselves. Many other things, for example, the ordinary course of business competition, cause loss which must usually go without legal redress as "part of the inevitable friction of society." But things normally innocent which cause loss are unlawful when they cannot be seen as tending to safeguard or promote the material interests of the doer. They are said then to be "malicious"—*malice* in law being best understood as meaning simply the *absence of justification;* for actual ill-will and desire to injure do not make an act legally

[16] *See* cases in Sayre, 187, 191, 194, 212, 213, especially Vegelahn v. Guntner, 167 Mass. 92, Sayre, 200, 203; U.S. v. Kane, 23 Fed. 748.

[17] 245 U.S. 299, Sayre, 488, 490, 503; cf. Sayre, "Inducing Breach of Contract", *Harvard Law Review.* 36: 663, 702.

malicious if the doer is justified in doing it. The doer's self-interest is a *justification,* negativing *malice.*[18]

The presence or absence of a "justifying" self-interest would usually be fairly obvious if courts in labor cases had not qualified the justification as "legitimate" self-interest.[19] Demands and strikes for better wages, hours, or conditions *for themselves, from their own employers,* are held "legitimate" and justifiable. But if the demand is for anything else, it is not "legitimate,"—though there is considerable judicial variation and confusion as to specific things. Any incidental injurious consequence of activity to enforce the demand will be imputed as a purpose, and the *entire activity* enjoined as part of a "conspiracy" to effect that purpose. The injunction will not forbid men to quit work; that would entail involuntary servitude. But it may forbid union officers to call or direct a strike, peaceful persuasion, and logically, though not yet in practice, even the solicitation or giving of alms for strikers' families.

Thus, if a strike is for better wages for employes of another employer with whom the strikers' own employer is in steady dealing (that is, a *Sympathic Strike*), any incidental consequence such as obstruction of interstate commerce or the United States mails, or simply injury to either employer or to anyone else, may be looked upon as a purpose and the "conspiracy" enjoined.[20] Or underselling by an "open shop" in which the union has no foothold, endangers not only the wage scale but the existence of the union in "closed shops" in the same industry. The union gets other unions to threaten strikes against companies which use products of the "open shop" (that is, the *Secondary Boycott*). The "conspiracy" is enjoined.[21] "Unfair" lists are similarly enjoined.[22]

[18] Mogul case, Sayre, 252.

[19] Taft, J., in the Superior Court of Cincinnati, quoted by himself in *Thomas v. C.N.O. & T.P. Ry.,* 62 Fed. 803; cf. *McClure's Magazine,* June, 1909. p. 204.

[20] In re Debs, 158 U.S. 564, Sayre, 751.

[21] Duplex case, 254 U.S. 443, Sayre 440.

[22] *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, Sayre, 462.

Recent coal and railway strike injunctions show a drastic tendency to go further and impute a "conspiracy to obstruct interstate commerce" even when men are striking against their own employers for better wages and conditions for themselves.[23]

The whole doctrine of "conspiracy" for an imputed purpose is arbitrary and artificial. The self-interest is as real as when men strike "on their own grievance." The incidental injurious consequence means nothing to them in itself. It is part of the inevitable friction of a society whose courts nullify legislation designed to correct the underlying conditions by which friction is intensified. It is impossible to believe that the political motive of sympathy with employers has not weighed heavily with courts in their denial of labor "justification" in these cases.[24]

V. Labor Injunctions Invade Civil Liberty

Provisions against effective opportunity to solicit, argue, and persuade, against "unfair lists," and against meetings and exhortations, arouse the warmest constitutional criticism. The question is not alone of specific rights to free speech, press, and assembly, but of the whole fundamental "liberty" inherent in free government, the right to do whatsoever one may deem conducive to one's well-being, subject only to the definite prohibitions which a substantial consensus of general opinion holds essential to public peace and the liberty of others. Legislatures may increase these prohibitions so long as they leave intact the essentials of free government. That is the way in which the consensus of general opinion properly expresses its recognition of new needs and conditions. When courts increase prohibitions, the result has

[23] U.S. v. Hayes, Sayre, 757; the "Dougherty" injunction, 283 Fed. 479, 286 Fed. 228, 290 Fed. 978; text of injunction, *Harvard Law Review*. 37: 1101.

[24] *See* Holmes, J. dissenting in Vegelahn v. Guntner, 167 Mass. 92; Sayre, at 204.

neither the definiteness nor the conspicuousness of legislation. It precedes, instead of follows, full public discussion. It is reached by reasoning which befuddles ordinary intelligence. There is no forum in which the accuracy of response to a true consensus of general opinion may be thrashed out.

The courts usually make short shrift of libertarian arguments in injunction cases.[25] The principles of liberty are abstractly acknowledged. But "liberty is not license;" there is no constitutional liberty to break the law. In the words of Justice Holmes on another subject, "it would be rash to say that some as yet unformulated truth may not be hidden under this proposition." In its ordinary use it begs the question. Libertarian contentions are not premised upon a claim of right to break valid laws. Their point in these cases is that judicial constructions and applications of law invade the liberty inherent in free government; that they obstruct the only lawful process by which conflicting elements in society may approach a balance which promotes the security of each and the welfare of all; that judge-made law, equally with acts of the legislature, when it invades fundamental liberty, is null. Such talk, naturally, is not listened to by judges.

VI. Conclusion

Opinion as to the partiality of the courts in labor cases depends largely upon agreement or disagreement with their applications of the doctrine of "malice" or "justification." This is worth another and closer view.

A person, or any number of persons, in a theatre audience may (without disorder) hiss an actor if they do not like his acting; if in consequence the actor loses his employment, it is his misfortune simply. But if they hiss him, *not* as an expression of opinion of work exposed for public approval, but because, regardless of the

[25] Gompers case, 221 U.S. 418, Sayre at 463-4.

quality of his acting they want to drive him out of his profession, their act is malicious and unlawful. The actor has a right to practice his profession; members of the audience have a right to express their opinion (however he may be damaged thereby) of the way he does it. But they have *no* right to injure him *unless* in the exercise of their own right—which is justification.

Every man has a right to pursue his interests—to invest capital, carry on business, sell his labor, withhold his labor, withhold his patronage, seek to strengthen his position, combine with others having similar interests to do any of these things in concert. He may mistake his true interests, and fail to gain. Whether he gains or not, others may lose. The goods he will not buy may, as in the Danbury Hatters' Case, cease moving in interstate commerce.[26] "Generally speaking, if, in the exercise of such a right by one, another suffers loss, he has no ground for action."[27] The loss, however, which a man may lawfully cause in the pursuit of his interest, he may *not* lawfully cause in wanton meanness. Should he be deemed actuated by wanton meanness when, instead of better wages for himself, directly, from his own employer, he demands that his employer stop employing non-union workmen, or stop doing business with some other employer whose men are on strike, or that union workmen generally stop buying an "open shop" product? Is it wanton meanness on his part to try to help the workmen of other employers to get better wages or conditions? May he not reasonably consider that even so indirect a benefit as an augmentation of the strength of unions generally is important both for his future betterment and for the maintenance of his present standard of living? The courts usually say No. Might they not as reasonably say that a man who makes a campaign contribution to a political party from principle, with no expectation of direct personal pecuniary benefit, is wan

[26] Loewe v. Lawler, 208 U.S. 274; 235 U.S. 522; Sayre, 121, 466, 636.
[27] Taft, J., in Moores v. Bricklayers' Union, quoted in 62 Fed. 803.

ton and malicious towards those whom that party's success will hurt in their pocket-books—that he would owe them damages if the party succeeded, and therefore, since the damages are impossible of precise calculation or would exceed his ability to pay, he may be enjoined from making his contribution?

Even if it could be felt that the courts in labor cases have impartially applied time-honored principles of settled law, a fundamental objection to labor injunctions would remain unanswered.

The friction of democracy is terribly wasteful. The checks and balances upon which democracy relies for its preservation were designed "not to promote efficiency but to preclude the exercise of arbitrary power."[28] The instinct of all power is to become arbitrary and oppressive. Under our system the instrumentalities of government (with a singular omission with respect to the judiciary) check this instinct in one another. But the danger of arbitrary power is not confined to instrumentalities of government. The theory of our constitutional guaranties of individual liberty is that, outside of government, free citizens by their free competition for well-being will check one another. The power of concentrated wealth is so enormous that, unchecked, it would quickly become as subversive of democracy as ancient feudalism. Legislation designed to abate, in however small a degree, ominous inequalities of fortune, is, according to the courts, inconsistent with constitutional guaranties of individual liberty.[29] We stand, therefore, with no constitutional check upon concentrated wealth except through the competition with it of combinations of persons who are individually puny. The power of men in combination has the same instinct of aggression as all other power. It can become selfish and brutal. It needs to be policed. But courts of equity are not properly

[28] Brandeis, J., in Myers v. U.S. (1926), 47 Sup. Ct. 21, 85. *The Federalist*, Nos. 47-51.

[29] Coppage v. Kansas, 236 U.S. 1.

policemen. And when, admitting as they freely do in words the right and need of labor combination, they nevertheless by injunctions prevent effective exercise of the power of labor combinations, they rank themselves against the constitutional principle of checks and balances and on the side of the concentrated wealth which threatens democracy. Protecting property even from the natural friction of free competitive society, they become auxiliaries of the "active militant power which would make it dominant over men."

The rough and tumble of free competition between giants is hard both upon competitors and upon bystanders—if there are, or can long be, such. It may be that the "wisdom of the wisest patriots" will some time devise a less costly method of maintaining a balance between conflicting interests which will "give security to each and promote the welfare of all." A suggestion once warmly pressed—compulsory arbitration—seems to please no one and has, so far as tried, been held unconstitutional.[30] Pending evolution of a satisfactory and constitutional substitute, what better can we do than cling to the method which we have—or had, until a generation of injunctions impeded it?

How can this mushroom growth of judicial impediment best be removed? Only a rash man would risk a confident answer. Legislation designed to remove it is held unconstitutional.[31] Will the courts remove it themselves? Judges often say (when they are not engaged in doing it) that it is not their business to conform decisions to debated views of social policy. They are often, nothwithstanding, acute and sagacious statesmen. Faced with a weight of intelligent dissatisfaction with what they have done, it is by no means unthinkable that they may direct their own slow and devious processes towards undoing it. Should this be despaired of, the question of consti-

[30] Wolff Packing Co. v. Kansas Court of Industrial Relations, 262 U.S. 522.

[31] Truax v. Corrigan, 257 U.S. 312; Sayre 220.

tutional amendment suggests itself. A possible approach would be through amendments providing a check, if we can find an agency fit to be entrusted with it, upon the power of the judiciary.

Additional References.

The most convenient source of reference for decisions is Sayre, "Cases on Labor Law," Cambridge, 1922, cited above as "Sayre."

The best compact presentation of objections to labor injunctions is in Justice Brandeis' dissenting opinion in *Truax v. Corrigan*, 257 U.S. 312, Sayre at 229 ff.

Helpful general discussions may be found in: John R. Commons and John B. Andrews, "Principles of Labor Legislation," Ch. III; Solomon Blum, "Labor Economics," Ch. V and VI; Robert F. Hoxie, "Trade Unionism," Ch. IX; John A. Fitch, "The Causes of Industrial Unrest;" John P. Frey, "The Labor Injunction"—ultra-partisan, but suggestive as to aspects not adequately treated elsewhere. Judge Caldwell's important dissenting opinion in *Hopkins v. Oxley Stove Co.*, 83 Fed. 912, is reprinted by Mr. Frey at p. 170 ff.

PRINCIPLES UPON WHICH INJUNCTIONS ISSUE IN LABOR DISPUTES[32]

Much confusion in the understanding of this subject will be avoided if we understand at the outset the relation which courts of equity issuing injunctions bear to the several other functions of the courts.

The criminal prosecutions are public proceedings conducted at the expense of the state to punish violations of public law. They do not restore to any individual anything which he may have lost, or compensate him for any injury he may have sustained, or protect his private

[32] By Mr. Murray T. Quigg, editor of *Law and Labor*.

rights. Civil suits are private suits maintained at the expense of private parties to compensate or protect individual litigants for injury actually sustained by reason of an unlawful act. Though an act be unlawful the courts of law and equity take no heed of it unless a private party employs an attorney and starts an action.

Thus in a case of assault and battery the criminal law may punish the assailant. The person assaulted may also start a private suit to recover damages. Thus the function of civil or private suits and the function of criminal suits are fundamentally different.

Civil actions are of two classes, law and equity. Generally speaking a court of law grants only money damages for any injury complained of, or by replevin returns an article of personal property to its lawful owner. Centuries ago courts of equity undertook to relieve the harshness of the rigid rules of law courts by giving greater consideration to moral and equitable claims, and by devising new forms of relief where the remedy by money damages was inadequate. By slow degrees, painstaking care, and after several hundred years of experience, the practice of equity courts has established well recognized rules which must be satisfied in order to entitle litigants to equitable relief. These rules were well established before trades disputes became frequent in courts of equity.

A. A litigant is entitled to relief when it appears to the court:

1. That the person or persons sued are injuring or threatening to injure the property or a property right of the person suing; and

2. That the injury is unlawful.

B. An injunction is the proper remedy when one of the following elements is present:

1. The injury cannot be compensated by a payment of money.

2. The injury threatens to continue.

3. The damage is not susceptible of accurate measurement in dollars and cents.

4. The persons threatening the injury could not pay the damages.

Thus an injunction does not issue unless it appears that the acts are unlawful and that money damages would not be adequate or appropriate relief. The rule is stated thus:

> Except as changed by statute, an injunction will not be granted where the remedy at law for the injury complained of is full, adequate and complete; . . . As the court is not in the exercise of its ordinary jurisdiction but is interfering to supply the deficiencies of legal remedies, it interferes only where there is immediate pressing necessity for the prevention of injury incapable of adequate compensation in damages at law or such as from its continuance or permanent mischief must occasion a constantly recurring grievance which cannot be otherwise prevented but by an injunction. All the courts agreed as to the rule, the problem in any individual case being whether the remedy at law is adequate, to be determined under all circumstances of the case and in view of the conduct of the parties. —32 *Corpus Juris,* 57.

In one of the earlier trades disputes the United States Circuit Court of Appeals stated this well known rule as follows:

> The test of the right to sue in equity is whether the combination complained of is so far unlawful that an action at law will lie to recover the damages inflicted, and whether the remedy at law is adequate to redress the wrong. If the remedy at law is for any reason inadequate, resort may be had, as in other cases, to a court of equity.—*Hopkins v. Oxley Stave Co.,* 83 *Fed.* 918.

These rules relating to the issuance of injunctions had been established for several centuries before there was occasion to consider their application to cases involving trades disputes. When such disputes did arise the court had but to dispose of the application for an injunction in accordance with time honored rules and tests.

The issues presenting themselves in applications for injunctions in trades disputes generally revolve about three points.

I. Is the right the plaintiff seeks to protect a property right?

II. Is the injury complained of unlawful?

III. Is the remedy at law inadequate?

I. The injunction in such cases issues only to protect property or a property right and, therefore, the first essential point in applying for an injunction is to show that a property right is involved.

The strike, picketing, and the boycott inflict injury upon business interests, impeding as they do the operation of business or else of property and the making or execution of contracts of employment and for the sale of merchandise. It is true, of course, that no employer or merchant has a vested interest in the goodwill of the labor market or of the public. Nevertheless, the right to do business, the right to enter into contracts of employment, the right to offer one's services or one's products upon the market as freely as other sellers may do and to buy as freely as other purchasers, has long been recognized as a property right.

So, too, the right to the unmolested enjoyments of the benefits of the contract entered into is a property right.

The Supreme Court in the Slaughter House cases, writing before trades disputes were frequent, said: "Labor is property and as such merits protection. The right to make it available is next in importance to the right of life and liberty."

In November, 1926, Mr. Justice Brandeis, speaking for the United States Supreme Court in an unanimous opinion, said:

> The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted.—*Dorchy v. Kansas.*

The American Federation of Labor secured the introduction and passage in the legislature of Massachusetts

of a statute forbidding the issuance of injunctions in trades disputes and declaring the right to labor to be a personal right. Shortly after the passage of this statute, the members of a union of hodcarriers in Boston affiliated with the American Federation of Labor refused to work wherever members of a hodcarriers union affiliated with the Industrial Workers of the World were at work, and tney threatened strikes of their members on all jobs by any contractors who employed I.W.W. hodcarriers on any job. The I.W.W. hodcarriers believed that wage earners have the right to be represented by "representatives of their own choosing." Notwithstanding that the American Federation of Labor hodcarriers were numerically stronger, the I.W.W. hodcarriers did not believe that their right to work should be taken from them at the election of the American Federation of Labor hodcarriers, if they too exercised their right to representatives of their own choosing. So they appealed to the Government for the protection of this right. Of course the only place to protect the right was in a court of equity, and the only means of protecting it was an injunction issued upon the theory that the infringement of the hodcarriers' right to work was an injury to a property right. The A.F.L. hodcarriers came to court and pointed to the statute declaring that the right to work is a personal right. The Chief Justice asked if it were possible that under our constitutional form of government, the legislature could leave to the well-to-do man the protection of the possessions he had acquired by his labor or by the labor of his father or his grandfather, and at the same time to take away from the man without means the protection of his right to labor by which he too might acquire the necessities and, if possible, the comforts of life. The Court said:

> The right to make contracts to earn money by labor is at least as essential to the laborer as is any property right to other members of society. If as much protection is not given by the laws to this property, which often may be the owner's only substantial

asset, as is given other kinds of property, the laborer stands on a plane inferior to that of other property owners. Absolute equality before the law is a fundamental principle of our Constitution.—*Bogni v. Perotti*, 112 *Northeastern* 853 *Mass.*

The case of Connors v. Connolly, 86 Conn. 641, 86 Atl. 600, was that of a former member of the United Hatters against the union to recover damages for interference with his right to work. The union, having a closed shop control of the industry in Connecticut, forbade the employment of Connors in any shop. The Court, in reversing the judgment for defendants, declared that the right to work "is the basic resource of individual existence."

So, if the right to labor is the very foundation of all property, freedom either for the buyer or the seller in making the labor contract is essential and fundamental. Anyone who by an unlawful act interferes with another in making or accepting or continuing an offer of employment or offer to work, interferes with property rights.

A contract or the right to make any contract is a property right and any attempt by an outsider wilfully to induce a breach of contract is unlawful.

An auctioneer has been restrained from stationing employees in front of the shop next to his to molest or interfere with its customers, whether actual or prospective. Newspaper publishers have been enjoined from conspiring to refuse to sell their papers to a dealer because he refused to handle the paper of a particular publisher, or in another case, because he refused not to handle the papers of a particular publisher. A combination of moving picture distributors has been enjoined from conspiring not to sell pictures to a particular theatre because it refused to confine its exhibitions to pictures offered by members of the combination. In each case these interferences with business have been regarded as interferences with property rights.

II. The second question, namely, is the injury unlawful, is not peculiar to the application for injunctive relief.

Equity holds nothing to be unlawful which would not be equally unlawful in a court of law. In 1775, the common law courts in England sustained a suit by a trader who complained that while his ship was off the coast of Cameroon for the purpose of trading with the natives, the defendant, a rival trader, fired a cannon at a canoe coming from the shore to trade with the plaintiff, killing a member of the native party and frightening off the others so that the plaintiff's trade was destroyed.[33]

Some years later the court sustained an action on the complaint of an actor who charged that the defendants came to the theatre by agreement among themselves to prevent the plaintiff from performing, and that they and their confederates hooted and interrupted his performance whenever he appeared.[34] Addison, a recognized authority on the law of torts, writing about 75 years ago says:

> Interference by force or fraud with the free exercise of another's trade or occupation, or means of livelihood, is a tort—such as preventing people by the use of threats and intimidation from trading with the plaintiff's vessel in a foreign port, or dealing at the plaintiff's shop, or sending their children to the plaintiff's school, or placing obstructions and impediments in the way of the exercise of the right of free access to and from a man's place of business.[35]

It is equally clear that interference with the contractual rights existing in the relation between the wage payer and the wage earner would justify an action at law:

> Also, if any person do hire or retain my servant, being in my service, for which the servant departeth from me, and goeth to serve the other, I may have an action of damages against both the new master and the servant, or either of them; but if the new master did not know that he is my servant, no action lies; . . . the reason and foundation upon which all this doctrine is built, seemed to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.—*Blackstone, Book* I.

Addison states the rule more broadly:

[33] *Tarleton v. McCauley,* Peake 270.
[34] *Gregory v. Duke of Brunswick,* 6 M. & Gr. 205.
[35] Addison, Vol. I, Chap. 1, Par. 22.

Malicious procurement of loss or damage to another, whether brought about by libel or slander, or by instigating servants to leave their service or desert their employment, to the injury of their masters, or by maliciously inducing a party to a contract to break his contract, to the injury of the person with whom the contract was made, creates that conjunction of wrong and damage which will support an action.[36]

And if a third person injures a servant, thereby causing the master the loss of his servant, the common law recognizes an action in the master against the third person.

A master also may bring an action against any man for beating or maiming his servant: but in such case he must assign, as a special reason for so doing, his own damage by the loss of service.—*Blackstone, Book* 1, *Chap.* 14, *p.* 249.

Thus in *Hart v. Aldridge,* 1 Cowp. 54, (1774) a suit for damages was brought by a master shoemaker, for enticing two of his journeymen shoemakers employed by piece, to leave his employment. The Court, by Ashton, J., said:

It is clear that a master may maintain an action against anyone for taking and enticing away his servant upon the ground of the interest which he has in his service and labour. And, even supposing, as my Lord has stated, that the servant did live in his own house, if he were employed to finish a certain number of shoes for a particular person by a fixed time, and a third person enticed him away, I think an action would lie. If not, it might be of very bad consequence in trade. He is a servant *quo ad hoc,* and though the seducer and enticer is much the worse, yet the law inflicts a penalty upon workmen leaving their work undone.

In *Bowden v. Hall,* Court of Appeals, 44 L.T. 75, it was held that where the plaintiff showed a contract with another as foreman of his plant, that he could recover damages against third persons for inducing the foreman to quit during the term of the contract and he could also have an injunction restraining the foreman from working for the defendants.

Neither the court by decisions nor the legislature by

[36] Vol. I, Chap. I, Par. 41.

statute have changed the law as it was set forth more than one hundred and fifty years ago as to the right to protect the contract of employment against the interferences from third parties.

American Law

Turning to the United States we find that interference with another in his employment by any threat or injury to person or property or by an act of coercion is declared to be a misdemeanor.[37] In many states we also find statutes forbidding boycotting and blacklisting.[38]

Section 580 of Penal Law of New York declares it a misdemeanor for two or more persons to conspire

> To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or,
>
> To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws.

These and similar statutes are a clear pronouncement of the public policy of our states which condemn acts of interference by coercive methods with a lawful business or employment of other persons. There are a number of cases between merchants, brought both at law and in equity, which show the development of the common law doctrine against malicious interference and which parallel in all respects the modern labor disputes in its legal and equitable aspects.

[37] New York Laws 1919, Chap. 88, Sec. 530 (From Penal Code, Sec. 653) Mass. General Laws 1921, Chap. 149, Sec. 19. There are similar statutes in Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin. See Bulletin of Bureau of U.S. Labor Statistics, No. 370.

[38] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Texas, Utah, Washington and Wisconsin. See Bulletin of U.S. Bureau of Labor Statistics, No. 370.

In *Boutwell v. Marr,* 71 Vermont 1 (1899), it appeared that an association of granite quarriers refused to sell stone for polishing to those who were not members of the association and they imposed fines on all who violated the rule. The plaintiff was engaged in polishing granite and as a result of the rule of the defendents was unable to procure stone. Upon his suit to enjoin the defendants from the enforcement of their rule, the Court said:

> It is clear that every one has a right to withdraw his own patronage when he pleases, but it is equally clear that he has no right to employ threats or intimidation to divert the patronage of another.
>
> When the will of the majority of an organized body in matters involving the rights of outside parties is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats and intimidations.[39]

In *Graham v. St. Charles Street Railway Company,* 16 Southern 806, Louisiana, (1895), a grocery dealer charged that the defendants' foremen undertook to instruct all employes not to deal with plaintiff on penalty of discharge. In an action for damages this was held to be a sufficient complaint, though the defendants' course of action might be justified on the trial.

In *Van Horn v. Van Horn,* 52 N.J. Law 284 (1890), a demurrer was overruled to a complaint charging the defendants with conspiracy to injure the plaintiffs' commission business by the circulation of false stories inducing those from whom the plaintiff purchased to refuse to consign further goods.

In *Webb v. Drake,* 52 La. 296, (1899), punitive damages were recovered by a hotel keeper against a combination refusing to deal with drummers who stopped at plaintiff's hotel.

In *Stroud v. Smith,* 194 Pa. 502, it was held actionable for a manufacturer to send notice to customers of a rival

[39] See also *Martell v. White,* 185 Mass. 255 (1904)

falsely stating that certain goods manufactured by the rival infringed his patents, and that if customers continued to handle such goods it would be necessary to sue them for injunction and damages.[40]

These are but illustrations from varied jurisdictions dealing with instances of unjustified interference by one with the business of another. In some of the cases cited, the appeal has been to equity and injunctions against further interference have also been granted. In many of the cases the element of conspiracy is present and undoubtedly played an important part in influencing the court's conclusion.

When the courts, therefore, turn to the subject of labor disputes they find that many of the kinds of injuries complained of are already condemned by statute and by the common law. It is not the function of the courts to make changes in law. It is not their function to rule upon theories of social benefit to be derived from exempting a great group, perhaps the majority of the citizens, from principles which apply generally in the law. If exemptions are to be made in the interests of a particular group or class, the exemption must be made by the legislature, and if necessary under our constitutional form of government by amendment to the Constitution.

Consider actual cases as they appear before the courts.

Because an employer refuses to discharge twenty-nine of his employes unless they will join a trade union, is it right that every merchant who deals in his products should be threatened with financial loss and that by such means his employes should be forced into a trade union? That was the Danbury Hatters' case. There was plenty

[40] See also *Sparks v. McCrary*, 47 So. 332, Ala. (1908), *Griffin v. Palatine Ins. Co.*, 235 S. W. 202 (Texas), *Hawarden v. Youghiogheny Coal Co.*, 113 Wis. 545, *Baldwin v. Escanaba Liquor Dealers Ass'n*, 130 N. W. 214 (Mich.), *Carnes v. St. Paul Stockyards Co.*, 205 N. W. 630 (Minn.), *Jackson v. Stanfield*, 137 Ind. 592 (1894), *Manufacturers Outline Co. v. Langley*, 20 R. I. 86 (1897), *Evenson v. Spaulding*, 150 Fed. 517, *Ertz v. Produce Exchange*, 79 Minn. 140, *Rourke v. Elk Drug Co.*, 75 A. D. 145 (N.Y.).

of authority in law and an act of Congress under which to condemn it.—*Loewe v. Lawlor,* 208 U.S. 274.

Because 3,000 strikers by persistent rioting and disorder drove 9,000 other workers from their employment, is it right that the 9,000 workers should accept the loss of their enterprises until the 3,000 strikers give up, or the employer capitulates? That was the Dail-Overland case. The police, in that instance, refused to do their duty, and when the Federal Court enjoined disorderly conduct, but permitted pickets posted by roster, the majority of the employes who had refused to go out on strike in the first place returned to work.—*Dail-Overland v. Willys Overland,* 267 Fed. 171.

A hardworking merchant struggling upward in the scale of life opens a small butcher shop which he runs by himself with the aid of his family. Because he refuses to employ outside help at wages fixed for him by an organization of men representing a combined economic strength hundreds of times greater than his, should he be driven out of business by persistent interference with his customers as they enter and leave the door of his shop? —*Yablonowitz v. Korn,* 205 A. D. 440 N.Y.

Because an erector of hollow metal doors, which can be set only with the use of carpenter's tools and by men skilled in the nicety of fine measurements, employs union carpenters on the erection of doors in the auditorium being built by the City of Cleveland, is it right that the sheet metal workers should be allowed to tie up the sheet metal work not only on that building but on the hospital also being built by the city, until the carpenters' employer is driven from the job by policemen?—*O'Brien v. Fackenthal,* 5 Fed. (2) 389.

Because the City of New Rochelle buys manufactured stone made in New Haven by trade unionists and sold for $45,000, is it right that the building trades of West

chester County should tie up the building, partly constructed, until the city and the contractor scrap the stone and buy it from dealers within a particular geographical area at a cost of $75,000?

The courts of equity faced with these specific questions in actual cases condemn the interference with business not only upon grounds of conscience but upon well established principles of law.[41] If great organizations of men, sometimes numbering two, three and four hundred thousand are to be permitted to advance their own business interests by injuries inflicted upon any and all other types and classes of persons in disregard of the common law, and the public policy of the state as pronounced in its statutes concerning injuries to trade and business such a grant of "divine right" must come by constitutional amendment and not from judges in courts of law and conscience.

These unlawful instances of interference do not, of course, establish the doctrine that every interference is unlawful. It is not within the range of an article on the injunction to attempt to trace the line between permissible and unlawful interference. Broadly speaking, a genuine direct benefit, will justify interference with another's affairs if the means employed causing the interference are lawful. Thus strikes for better wages, hours, and working conditions are lawful. But if the interference is for a remote or doubtful benefit, (e.g. sympathetic strikes) or is brought about by threats or coercion upon third persons, (e.g. secondary boycotts, jurisdictional strikes, intimidating picketing) it is unlawful.

III. Should the remedy be a suit at law for damages or an injunction in equity?

The rule as to what constitutes injury irreparable by damages is stated by Corpus Juris as follows:

[41] There are a number of strictly labor cases brought in the courts of law for money damages. See *Bronson v. I.W.W.*, 95 Pac. 354, (Nev.); *Potts Mfg. Co. v. Protection Lodge*, 60 Atl. 74 (Vt.); *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Purington v. Hinchliff*, 76 N.E. 47 (Ill.); *Carlson v. Carpenter Contractors*, 137 N. E. 222 (Ill.).

An injury to be irreparable need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages, or where there exists no certain pecuniary standard for the measurement of the damages. This inadequacy of damages as a compensation may be due to the nature of the injury itself or to the nature of the right or property injured, and according to many decisions it may also be due to the insolvency or want of responsibility of the person committing the acts complained of, although some courts have reached the opposite conclusion. Of course if the injury is irreparable aside from the fact of defendant's insolvency it is of no importance whether defendant is solvent or not. To render an injury irreparable it is not necessary that the pecuniary damage be shown to be great; but on the contrary, it has been said, the fact that in an action at law the jury could award nominal damages only, often furnishes the very best reason for interference by a court of equity by injunction. It has also been said that the injury is irreparable when the only remedy at law is by a large number of suits for damages which by reason of their number and cost will produce no substantial results, or where one is deprived of some right to property which is essential to its full use. Of course, where compensation in money would be adequate, the injury cannot be said to be irreparable.

In some of the earlier trade union cases it was said:

Some of the plaintiff's property was destroyed, his employes were attacked, and the persons who sought his employment were threatened and menaced. For these acts the perpetrators are liable in damages; but they being, as it is alleged, irresponsible, a judgment for damages would be unavailing, would not suppress the wrongs, and would necessitate a multitude of actions. Besides this, the damages which arise from the destruction of a business, with a loss of contracts, cannot be ascertained even approximately. In such cases an injunction restraining the commission of such acts is an appropriate remedy. It is urged that there is no precedent in this state which sustains an injunction in such a case. To this it may be answered that there is no case denying the power of this court to grant such relief, and there are many cases in other jurisdictions where the exercise of this power has been sustained. . . It is far better for employers and employes, and for the peace and safety of the state, that such relief be exercised by the courts where parties can be heard, than to permit such violations of law to go unrestrained until force is arrayed against force, and the strong arm of the executive is compelled to intervene with troops to prevent disorder and the destruction of property.—*Davis v. Zimmerman*, 303 *N.Y. Supp.* 36, (1895).

In using a special injunction to protect the property in the custody of the receivers against threatened acts which it is ad-

mitted would, if not restrained, have been committed, and would have inflicted irreparable loss upon that property, and seriously prejudiced the interests of the public, as involved in the regular continuous operation of the Northern Pacific Railroad, the circuit court, except in the particulars indicated, did not restrain any act which, upon the facts admitted by the motion, it was not its plain duty to restrain. No other remedy was full, adequate, and complete for the protection of the trust property, and for the preservation of the rights of individual suitors and of the public in its due and orderly administration by the court's receivers. "It is not enough," the court said in Boyce's Ex'rs v. Grundy, 3 Pet. 210, "that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity.—*Arthur v. Oakes,* 63 *Fed.* 310, (1894).

. . . and that brings us to the question raised by the answer, and most strongly insisted upon by counsel in the argument, as to whether this court has jurisdiction to grant relief by way of injunction. Even when there is a legal remedy, equity will interfere by injunction to prevent (1) an injury which threatens irreparable damage, or (2) a continuing injury, when the legal remedy therefor may involve a multiplicity of suits. This jurisdiction is established and unquestionable. In practice, the criterion of its application is the inadequacy of the legal remedy, depending on whether (1) "the injury done or threatened is of such a nature that when accomplished, the property cannot be restored to its original condition, or cannot be replaced by means of compensation in money;" (2) whether full compensation for the entire wrong can be obtained without resort to a number of suits, 3 Pom. Eq. Jur. Par. 1338, 1346, 1357. The difficulty of satisfactorily estimating damages to business is frequently recognized in applying those principles to suits relating to good will, trade-marks, patent rights, and copy rights. The complainant's paper is published daily.—*Barr v. Essex Trades Council,* 53 *N.J. Eq.* 101, (1894).

It seems beyond dispute that the injuries suffered by a strike, or by the unlawful conduct of a strike, or by a boycott, are so uncertain as to be beyond the possibility of fair measure in money damages. It is also apparent that in the great majority of trades disputes the injury is of a continuing nature. If, therefore, the conduct causing the injury is unlawful at law, it is in accordance with these well established rules, proper and inevitable that equity should take jurisdiction of the suit and restrain the continuance of unlawful acts. To rule otherwise merely

because the parties to the litigation are employer and employe would entail departure from established rules of legal and equitable practice. It is beyond the province of the courts to take any such departure and to refuse protection to well recognized rights merely because their injury arises out of disputes involving employment relations.

Criticism of the Injunction

Many criticisms have been directed against injunctions in labor disputes which are not properly criticisms of the injunctive process, but are criticisms of the fundamental rights of the parties as a matter of law, irrespective of the right to injunctive relief.

For instance, it is urged against the use of injunctions in labor disputes that they violate constitutional principles of freedom of speech and assembly; that they are used to enjoin the commission of crime; and that they prevent men from doing in concert what would be perfectly lawful for men to do as individuals. This would seem to be sufficiently answered by Mr. Justice Holmes in *Aikens v. Wisconsin,* 195 U.S. 194:

> No conduct has such absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

The doctrine of freedom of assembly does not extend to the protection of aggregations on the public streets bent upon pressing their private and personal interests upon the attention of passers-by or of thereby interfering with the progress of another's legitimate business.

The right of freedom of speech, subject to liability for an action for libel for abuse thereof, does not extend to the right to use speech to incite to riot, to threaten injury, to conspire to injure, or otherwise to employ its use as a step in an unlawful plot. One injured in his

trade and calling and entitled to protection does not lose the right to that protection because those committing the injury employed words instead of guns or dollars.

The fact that any act may be prosecuted as a crime does not relieve it of civil illegality. The litigant is entitled to the protection of his civil rights in the civil courts at law and equity. If the acts of a defendant infringe upon civil rights, the fact that he may also have committed a crime cannot reasonably be urged as a ground for restraining the functions of the civil courts in such a case.

As to the charge that injunctions should not restrain many from doing what one might do, it needs but to point out that if any individual did do it it would be equally unlawful. But in many types of cases individuals are not guilty simply because acting independently of all others they would have no interest in the matter or they could effect no result. One workman would be just as liable as a combination if an act of interference on his part coerced customers or prospective employes or induced third persons to breach their contracts. His mere solicitation of customers or prospective employes may not be actionable because, acting alone, he cannot coerce. Surely no man should go free, because he gets somebody to help him inflict an injury which he could not inflict alone. But if and when an individual shows the power to coerce third persons to abstain from dealing an injunction lies as certainly as where coercion is accomplished by a combination.

The injunction has great merit in that it brings before the court all of the members of a combination who are responsible for the wrong doing complained of. If those unlawfully injured by trades disputes are forced to be satisfied with such protection as the criminal law or damage may afford, then over-zealous pickets, misguided agents and, possibly, hired thugs, may have to pay the penalty of their wrongdoing; but the leaders of the disturbance, who have assumed responsibility for the success

of the strike, may proceed with their plans out of which the criminal wrongdoing arises and escape all the penalties. If injured parties must be relegated to a money claim they may have to bring a multiplicity of suits, part of their damages may be unprovable, and the provable parts may be uncollectible. But more than that, if there are union funds available it is unfortunate to have them seized for indemnity. The vast number of wage earners often embroiled in a strike situation who are unsympathetic to the strike and wholly opposed to any unlawful action, may find not only their union funds but their own savings liable for the payment of damage done in spite of their protest, but with the aid of the machinery which they have created and sustained.

The injunction protects the ignorant or overzealous wage earner from the unlawful conduct which his own leaders may urge upon him. It protects the innocent and protesting wage earner from having to pay for the mistake which his leaders would otherwise be permitted to make. The injunction is, in actual operation, an instrument of mercy, since it protects not only the injured party but it protects the wrongdoer against himself, and in a large group of wrongdoers it protects the morally innocent from the leadership or compulsion of the rest.

The Danbury Hatters case was tried under the Sherman Act. At that time no statute granted the right of a private litigant to have an injunction against a combination in restraint of interstate trade. A judgment was recovered against individual workers for $200,000. The Clayton Act granted the private litigant the right to an injunction against injuries sustained from an interstate restraint of trade. In the Duplex case, therefore, instead of recovering a heavy monetary penalty from the Machinists' Union for an unlawful secondary boycott after great damage had been done, the employer went at once into equity and secured an injunction. Such procedure

was certainly more reasonable and merciful both to the plaintiff and the defendants.

In conclusion, let it be remembered that the protest against so-called government by injunction involves a protest against established principles of equitable jurisdiction which were thoroughly established long before labor litigation demanded attention from the courts. These principles grow out of practical considerations, with the merciful purpose of relieving people from the injustices which flowed from the harsh and rigid principles of the law courts. When the courts came to consider labor litigation they properly applied the old tests, proved up by centuries of usage. The demand for a change in the interest of a special class would require an overthrow of what human experience has found to be of great value.

Equity enjoins nothing which the court does not find to be unlawful, and the tests of illegality are the same in a court of equity as in a court of law. People too often forget this and confuse the substantive law, which deals with the illegality of the defendant's act, with the law relating to remedies, which deals only with the form of relief to be granted. In reality, criticism of the injunction is often misdirected, and the real objection is against the action of the courts in declaring certain activities to be illegal.

As a remedy the injunction is the most considerate remedy which the courts have devised. It is far better to direct wrongdoers not to pursue a certain course of illegal acts and thus give them timely notice of the character of their conduct in a specific case, than to wait until the harm has been done and then to punish or hold in damages. If injunctions were not thus used every employer and employe would find themselves in the position where at their peril they must determine their own course of conduct, sometimes in doubtful cases, and thus jeopardize their liberties and their funds without being expressly advised in a specific case that their conduct was wrongful.

COMMUNIST AND FASCIST VIEWS

Nikolai Lenin [1]

The state is a particular form of organization of force; it is the organization of violence for the purpose of holding down some class. What is the class which the proletariat must hold down? It can only be, naturally, the exploiting class, i.e., the bourgeoisie. The toilers need the state only to overcome the resistance of the exploiters, and only the proletariat can guide this suppression and bring it to fulfilment—the proletariat, the only class revolutionary to the finish, the only class which can unite all the toilers and the exploited in the struggle against the capitalist class for its complete displacement from power. (p. 28)

Democracy for the vast majority of the nation, and the suppression by force—that is, the exclusion from democracy—of the exploiters and oppressors of the nation; this is the modification of democracy which we shall see during the transition from capitalism to communism.

Only in Communist society, when the resistance of the capitalists has finally been broken, when the capitalists have disappeared, when there are no longer any classes (that is, when there is no difference between the members of society in respect of their social means of production), *only then* "does the state disappear *and one can speak of freedom.*" Only then will be possible and will be realized a really full democracy, a democracy without any exceptions. And only then will democracy itself begin to wither away in virtue of the simple fact that, freed from capitalist slavery, from the innumerable horrors, sav-

[1] From his *State and Revolution.* George Allen & Unwin, Ltd. London. 1917.

agery, absurdities and infamies of capitalist exploitation, people will gradually *become accustomed* to the observation of the elementary rules of social life, known for centuries, repeated for thousands of years in all sermons. They will become accustomed to their observance without constraint, without subjection, without the *special apparatus* for compulsion which is called the state. (p. 91)

Engels expressed this splendidly in his letter to Bebel when he said, as the reader will remember, that "the proletariat needs the state, not in the interests of liberty, but for the purpose of crushing its opponents; and, when one will be able to speak of freedom, the state will have ceased to exist." (p. 91)

The expression "the state withers away," is very well chosen, for it indicates the gradual and elemental nature of the process. Only habit can, and undoubtedly will, have such an effect: for we see around us millions of times how rapidly people get accustomed to observe the necessary rules of life in common, if there is no exploitation, if there is nothing that causes indignation, that calls forth protest and revolt and has to be suppressed. (p. 91-2)

Again during the *transition* from capitalism to communism, suppression is *still* necessary; but in this case it is the suppression of the minority of exploiters by the majority of exploited. A special instrument, a special machine for suppression—that is, the "state"—is necessary, but this is now a transitional state, no longer a state in the ordinary sense of the term. For the suppression of the minority of exploiters by the majority of those who were *but yesterday* wage slaves, is a matter comparatively so easy, simple and natural that it will cost far less bloodshed than the suppression of the risings of the slaves, serfs or wage laborers, and will cost the human race far less. And it is compatible with the dif-

fusion of democracy over such an overwhelming majority of the nation that the need for any *special machinery*" for suppression will gradually cease to exist. (p. 92-3)

LEON TROTSKY[2]

. . . Is it permissible to suppress newspapers?

During war all institutions and organs of the state and of public opinion become, directly or indirectly, weapons of warfare. This is particularly true of the press. No government carrying on a serious war will allow publications to exist on its territory which openly or indirectly support the enemy. Still more so in a civil war. The nature of the latter is such that each of the struggling sides has in the rear of its armies considerable circles of the population on the side of the enemy. In war where both success and failure are repaid by death, hostile agents who penetrate into the rear are subject to execution. This is inhumane, but no one ever considered war a school of humanity—still less civil war.

Can it be seriously demanded that during a civil war with the White Guards of Denikin, the publications of parties supporting Denikin should come out unhindered in Moscow and Petrograd? To propose this in the name of the "freedom" of the press is just the same as in the name of open dealing, to demand the publication of military secrets. "A besieged city," wrote a Communard, Arthur Arnould of Paris, "cannot permit within its midst that hopes for its fall should be openly expressed, that the fighters defending it should be incited to treason, that the movements of its troops should be communicated to the enemy. Such was the position of Paris under the Commune." Such is the position of the Soviet Republic during the two years of its existence. (p. 59)

"The Soviet Government," Kautsky thunders, "has destroyed the sole remedy that might militate against

[2] From his *Dictatorship vs. Democracy*. Workers Party of America, 799 Broadway. New York.

corruption: the freedom of the press. Control by means of unlimited freedom of the press alone could have restrained those bandits and adventurers who will inevitably cling like leeches to every unlimited, uncontrolled power." And so on.

The press as a trusty weapon of the struggle with corruption! This liberal recipe sounds particularly pitiful when one remembers the two countries with the greatest "freedom" of the press, North America and France, which at the same time are countries of the most highly developed stage of capitalist corruption.

Feeding on the old scandal of the political ante-rooms of the Russian revolution, Kautsky imagines that without Cadet and Menshevik freedom the Soviet apparatus is honeycombed with "bandits and adventurers". Such was the voice of the Mensheviks a year or eighteen months ago. Now even they will not dare to repeat this. With the help of Soviet control and party selection, the Soviet Government, in the intense atmosphere of struggle, has dealt with the bandits and adventurers who appeared on the surface at the moment of the revolution incomparably better than any government whatsoever, at any time whatsoever.

We are fighting. We are fighting a life-and-death struggle. The press is a weapon not of an abstract society, but of two irreconcilable, armed and contending sides. We are destroying the press of the counter-revolution, just as we destroyed its fortified positions, its stores, its communications, and its intelligence system. Are we depriving ourselves of Cadet and Menshevik criticisms of the corruption of the working class? In return, we are victoriously destroying the very foundations of capitalist corruption. (p. 60-1)

There is another difference between the White Terror and the Red which Kautsky today ignores, but which in the eyes of the Marxist is of decisive significance. The White Terror is the weapon of the historically reaction-

ary class. When we exposed the futility of the repressions of the bourgeois state against the proletariat, we never denied that by arrests and executions the ruling class under certain conditions might temporarily retard the development of the social revolution. But we were convinced that they would not be able to bring it to a halt. We relied on the fact that the proletariat is the historically rising class, and that bourgeois society could not develop without increasing the forces of the proletariat.

The bourgeoisie today is a falling class. It not only no longer plays an essential part in production, but by its imperialist methods of appropriation is destroying the economic structure of the world and human culture generally. Nevertheless, the historical persistence of the bourgeoisie is colossal. It holds to power, and does not wish to abandon it. Thereby it threatens to drag after it in the abyss the whole of society. We are forced to tear it off, to chop it away.

The Red Terror is a weapon utilized against a class doomed to destruction, which does not wish to perish. If the White Terror can only retard the historical rise of the proletariat, the Red Terror hastens the destruction of the bourgeoisie. This hastening—a pure question of acceleration,—is at certain periods of decisive importance. Without the Red Terror, the Russian bourgeoisie, together with the world bourgeoisie, would throttle us long before the coming of the revolution in Europe. One must be blind not to see this, or a swindler to deny it. The man who recognizes the revolutionary historic importance of the very fact of the existence of the Soviet system must also sanction the Red Terror. (p. 63-4)

A B C of Communism [3]

In a "dictatorship" there is a strong form of government and men must agree to a high degree of resolute-

[3] From Bukhari, Nikolai Ivanovich, and Preobrazhenski, E. *A. B. C. of Communism;* tr. by P. Lavin. p. 65-6. Marxian Educational Society. Detroit. 1921.

ness in the work of suppressing an enemy. It is evident that in such a situation there can be no talk of "freedom" for everybody. The dictatorship of the proletariat is incompatible with the freedom of the bourgeoisie. The dictatorship is, in fact, necessary to deprive the bourgeoisie of their freedom, to chain them hand and foot in order to make it absolutely impossible for them to fight the revolutionary proletariat. The more stubborn the resistance of the bourgeoisie is, the more desperately they must use their strength, the more dangerous they become; the harsher and more bitter must be the proletarian dictatorship, which in an extreme case dare not cease till the terror is overcome. Only after the complete overthrow of the exploiters and the crushing of their resistance, when it is no longer possible for them to injure the working class, only then will the dictatorship of the proletariat become milder. The bourgeoisie will gradually be merged in the proletariat, the workers' state will gradually die away, and the society will become a Communist society in which there will be no class divisions.

C. E. RUTHENBERG[4]

The Communists are not in principle opposed to free speech. On the contrary, they are for the freest sort of speech when the conditions exist which will give equal opportunity for freedom of speech to everyone and they are using all their energy to bring about a social order in which such freedom of speech can exist.

On the other hand, the Communists are not to be deluded by an appearance of equality so far as freedom of speech is concerned. They maintain that under existing conditions of the capitalist system with the newspapers, schools, colleges, moving picture theatres, radio and other instruments of publicity in the hands of the dominant capitalist class; that with the greatest possible freedom of speech written into the Constitution and laws, there

[4] National Secretary of Workers' Party of America, 1923.

could be no real equality so far as freedom of speech is concerned.

They also maintain that in a period of life and death struggle between two contending classes, a struggle which all historical precedents indicate will develop into such open civil war as existed in Russia for three or more years, it is impossible for freedom of speech to exist. When two classes are fighting for mastery and the struggle has developed so far, then, as Communists, we believe that it is our duty to suppress with an iron hand all opposition to the class which is struggling to bring into existence a new social order which in its development will make possible a real equality so far as expression of ideas is concerned.

We believe that in our fight for Communism we are also fighting for those conditions which will, for the first time, make real freedom of speech, through putting on a basis of equality all groups and individuals in the social order.

MUSSOLINI [5]

They speak of liberty. But what is this liberty? Does liberty exist? After all, it represents a philosophical and moral concept. There are various manifestations of liberty. Liberty never existed. The Socialists have always denied it. The liberty of work has never been admitted by you. You have beaten the blackleg when he presented himself at the factories when the other workmen were on strike.

* * *

You forget a very simple thing, that the revolution has the right of defending itself. Is there in Russia liberty of association for those who are not Bolshevists? No! Is there liberty of press for them? No! Is there liberty of meeting, of vote? No! You who are the de-

[5] Quotations from speeches of Mussolini, 1914-1923. Reprinted by permission from *Mussolini as Revealed in His Political Speeches.* (November, 1914-August, 1923), by Bernado Quaranta di San Severino. Published by E. P. Dutton & Co. New York. 1923.

fenders of the Russian regime have not the right to protest against a regime like mine, which cannot, even distantly, be compared with that of the Bolshevists.

I am not, gentlemen, a despot who remains locked up in a castle protected by strong walls. I circulate freely amongst the people without any concern whatsoever, and I listen to them. Well, the Italian people, up to now, have not asked for liberty. At Messina the population which surrounded my carriage said: "Take us out of these wooden huts." In Sardinia—you will notice that I am speaking of a region where Fascismo has not tens of thousands of followers as in Lombardy—in Sardinia, at Arbatax, men came to me with drawn faces; they surrounded me and, pointing out to me a track with a putrid river among the marshy reeds, said to me: "Malaria is killing us!" They did not speak to me of liberty, of the Statute, of the Constitution. It is the emigrants of the Fascista revolution who create this idol which the Italian people, and now, too, foreign public opinion, has largely dismantled.

* * *

But liberty, gentlemen, must not be converted into license. What they ask for is license, and this I shall never grant! You can, if you wish, organize and march along in processions and I shall have you escorted. But if you intend to throw stones at the carabineers or to pass through a street where it is forbidden to do so, you will find the state which opposes you, if necessary by force.

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